(2)

No. 91-1729-CFX
Status: GRANTED

Title: United States, et al., Petitioners
v.
Texas, et al.

Docketed:
April 27, 1992

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Horne,Edwin N.

Entry	Date	Note	Proceedings and Orders
1	Apr 27 1992	G	Petition for writ of certiorari filed.
3	May 18 1992		Order extending time to file response to petition until June 26, 1992.
4	Jun 26 1992		Brief of respondents Texas, et al. in opposition filed.
5	Jul 1 1992		DISTRIBUTED. September 28, 1992
6	Jul 13 1992	X	Reply brief of petitioner filed.
7	Oct 5 1992		Petition GRANTED.
			**********
8	Oct 22 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Fifth Circuit.
9	Nov 3 1992		Record filed.
		*	Original proceedings United States District Court for the Western District of Texas (1 BOX)
10	Nov 19 1992		Brief of petitioners filed.
11	Nov 19 1992		Joint appendix filed.
13	Dec 14 1992		Order extending time to file brief of respondent on the merits until January 8, 1993.
14	Dec 28 1992		SET FOR ARGUMENT MONDAY, MARCH 1. 1993. (1ST CASE).
15	Jan 7 1993		Brief of respondents Texas, et al. filed.
17	Jan 14 1993		CIRCULATED.
18	Feb 10 1993	X	Reply brief of petitioner filed.
19	Mar 1 1993		ARGUED.

No. 91-1729

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA
AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

STATE OF TEXAS
AND
TEXAS DEPARTMENT OF HUMAN RESOURCES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the United States retains its common-law right to collect prejudgment interest on debts owed by the States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes, regulations and rule:

Statutes, regulations and rule—Continued: Page

Miscellaneous:

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States and the United States Department of Agriculture, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a), is reported at 951 F.2d 645. The opinion and judgment of the district court (App., *infra*, 15a-29a, 30a-31a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Debt Collection Act of 1982, Pub. L. No. 97-365, § 11, 96 Stat. 1755-1756, as amended, 31 U.S.C. 3701(c), 3717, and the regulations promulgated thereunder, 4 C.F.R. 102.13(i), are reproduced at App., *infra*, 46a-48a.

STATEMENT

1. Congress adopted the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749,[1] to enhance and render more efficient the federal government's efforts to collect debts. See 96 Stat. 1749, Preamble. The Act requires federal agencies to assess interest on debts owed them, 31 U.S.C. 3717(a)(1), and to impose "a penalty charge of not more than 6 percent" on debts not paid within 90 days. 31 U.S.C. 3717(e)(2). Each federal agency must also assess "a charge to cover the cost of processing and handling a delinquent claim." 31 U.S.C. 3717(e)(1).

Section 3717, the provision of the Act governing imposition of interest and penalties, applies only to debts owed the United States by any "person." 31 U.S.C. 3717(a)(1). The Act provides that, for purposes of Section 3717, the term "person" does not include "an agency of the United States Government,

[1] Pursuant to Pub. L. No. 97-452, § 1, 96 Stat. 2469-2474, the pertinent provisions of the Act were codified at 31 U.S.C. 3701, 3716-3719. As part of that codification, various non-substantive changes were made.

of a State Government, or of a unit of general local government." 31 U.S.C. 3701(c). This case presents the question whether the Act's exclusion of state and local governments from the scope of Section 3717 had the effect of abrogating the federal government's pre-existing common-law right to seek prejudgment interest on debts owed by those governmental entities.

2. The debts involved in this litigation arise from Texas's participation in the Food Stamp Program. Under that program, the Food and Nutrition Service (FNS) of the United States Department of Agriculture provides food stamp coupons to participating States for distribution to qualified individuals and households based on need. 7 U.S.C. 2013(a), 2014. The cost of the food stamps is borne entirely by the United States; the cost incurred by the participating State in the administration of the program is divided equally between the state and federal governments in most cases. 7 U.S.C. 2025(a).

The Food Stamp Program regulations allow participating States to distribute food stamp coupons by mail. 7 C.F.R. 274.3. States that elect to utilize that distribution method are, however, obligated to reimburse the federal government for a portion of the cost of replacing coupons that are lost or stolen in the mail and later redeemed by persons other than the intended recipients.[2] 7 U.S.C. 2016(f). States must make reimbursement for all such mail issuance losses in excess of a "tolerance level" established by regulation. 7 C.F.R. 276.2(b)(4).

3. At all times pertinent here, the State of Texas was a voluntary participant in the Food Stamp Pro-

[2] Food stamp coupons are negotiable obligations of the United States, redeemable at face value for approved food products. 7 U.S.C. 2013, 2016. Thus, they can easily be used by persons other than the intended recipient.

gram, and as such had agreed to abide by the program regulations. The State utilized the mails for a large proportion of its food stamp deliveries, and suffered substantial losses in excess of the loss tolerance limits, in part as a result of theft by United States Postal Service employees. App., *infra*, 2a.

The State's mail issuance losses in excess of the tolerance limits amounted to $150,350 for the period from April 1986 through September 1986, and $262,035 for the period from October 1986 through March 1987. The FNS notified the State of its liability for those losses, and further advised the State that interest would begin to accrue on the balance outstanding unless payment was made within 30 days. App., *infra*, 3a.

The State sought administrative relief, asking the FNS's State Food Stamp Appeals Board to grant waivers of the State's liability for the mail issuance losses. After conducting administrative hearings, the Appeals Board denied relief. App., *infra*, 3a.

4. The State brought suit against petitioners in the United States District Court for the Western District of Texas, seeking judicial review of the Appeals Board's refusal to grant waivers of its liability for the mail issuance losses. The State contended that its excess mail losses should have been waived because a portion of those losses was caused by Postal Service employee theft. The State further claimed that the Debt Collection Act of 1982 precluded the imposition of interest on any amounts owed the federal government by the State.

The district court granted summary judgment in favor of petitioners on both issues. App., *infra*, 30a-31a. The court held that the decision whether to grant a waiver of the State's liability was unreviewable because it was committed to agency discretion by

law, citing *Heckler* v. *Chaney*, 470 U.S. 821 (1985), and *Webster* v. *Doe*, 486 U.S. 592 (1988). App., *infra*, 19a-22a. The court ruled in the alternative that the denial of the State's requests for waivers was not arbitrary or capricious. *Id.* at 25a-26a.

The district court also concluded that the United States was entitled to receive prejudgment interest on the amounts owed by the State. The court acknowledged the existence of a circuit conflict on that issue, but adopted the views of the Tenth Circuit in *Gallegos* v. *Lyng*, 891 F.2d 788 (1989), which held that the federal government's common-law right to prejudgment interest from a State survived the enactment of the Debt Collection Act. App., *infra*, 26a-27a, 28a-29a. The district court also rejected the State's contention that, under *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981), imposition of prejudgment interest on the State was impermissible because the Food Stamp Act did not itself authorize such interest. The court explained that *Pennhurst* does not apply to the use of existing remedies against a State that fails to satisfy its duties under a federal program. App., *infra*, 27a-28a, citing *Bell* v. *New Jersey*, 461 U.S. 773 (1983).

5. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-14a. The court agreed that the Appeals Board's decision not to waive the State's liability for excessive food stamp mail issuance losses was not judicially reviewable, and thus rejected the State's challenge to the district court's ruling on that issue. App., *infra*, 5a-7a. The court reversed, however, that portion of the district court's judgment requiring the State to pay prejudgment interest. App., *infra*, 7a-13a.

The court of appeals began its analysis by noting the existence of a circuit conflict on the prejudg-

ment interest issue. App., *infra*, 7a (citing *Perales* v. *United States*, 751 F.2d 95 (2d Cir.) (per curiam), aff'g 598 F. Supp. 19 (S.D.N.Y. 1984) (rejecting federal government's claim to prejudgment interest); *Pennsylvania Dep't of Public Welfare* v. *United States*, 781 F.2d 334 (3d Cir. 1986) (same); *Arkansas* v. *Block*, 825 F.2d 1254 (8th Cir. 1987) (same); and *Gallegos* v. *Lyng*, 891 F.2d 788 (10th Cir. 1989) (allowing federal government's claim for prejudgment interest)). Aligning itself with the Second, Third, and Eighth Circuits, the court held that "the Debt Collection Act of 1982 abrogated the federal common-law right to assess interest on outstanding debts of the states incurred under the mail issuance loss provision of the Food Stamp Act." App., *infra*, 13a.

The court agreed that there was "no discernible legislative history to guide us with this question," and that the purpose of the Debt Collection Act was "to tighten the collection process and create incentives for the timely payment of debts to the United States." App., *infra*, 10a, 11a. The court rejected, however, the argument that abrogation of the United States' common-law right to prejudgment interest would create incentives for States to delay payment of their obligations under the Food Stamp Program, asserting that the federal government could enforce its claims against the States through administrative offset procedures. App., *infra*, 11a, citing 7 U.S.C. 2016(f), 2022(a); 7 C.F.R. Pt. 276. The court found inapplicable the principle that implied repeals of the common law are disfavored, holding that Congress had expressly chosen to exclude States from the category of persons liable for prejudgment interest. For the same reason, the court also declined to defer to

the contemporaneous construction of the Act by the implementing agencies. App., *infra*, 11a-12a.

Finally, the court drew additional support for its conclusion from *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). The court noted that *Pennhurst* requires Congress to speak unambiguously when it seeks to impose conditions on the States pursuant to the spending power, and apparently concluded that *Pennhurst* governed in this case because the question of prejudgment interest was controlled by the applicable statutes. App., *infra*, 13a.

REASONS FOR GRANTING THE PETITION

The question whether the United States retains its common-law authority to seek prejudgment interest on debts owed by the States was expressly reserved by this Court in *West Virginia* v. *United States*, 479 U.S. 305, 312 n.6 (1987). The courts of appeals are divided on that question, which is one of considerable importance to the administration of state-federal cooperative grant and welfare programs. Accordingly, review by this Court is warranted.

1. As the district court and court of appeals below correctly noted, the circuits are in disagreement over the effect of the Debt Collection Act of 1982 on the United States' preexisting common-law right to collect prejudgment interest from the States and their political subdivisions. In addition to the Fifth Circuit in this case, three other courts of appeals—the Second Circuit in *Perales* v. *United States*, 751 F.2d 95, 96 (per curiam), aff'g 598 F. Supp. 19, 23-26 (S.D.N.Y. 1984), the Third Circuit in *Pennsylvania Dep't of Public Welfare* v. *United States*, 781 F.2d 334, 341-342 (1986), and the Eighth Circuit in

Arkansas v. *Block*, 825 F.2d 1254, 1258 (1987)—have ruled that the Debt Collection Act abrogates the federal government's right to seek prejudgment interest against state and local government entities. The Sixth and Tenth Circuits, on the other hand, have reached the opposite conclusion. See *Gallegos* v. *Lyng*, 891 F.2d 788, 795-800 (10th Cir. 1989); *County of St. Clair* v. *United States Dep't of Labor*, 754 F.2d 375 (6th Cir. 1984) (Table).[3]

The relevant arguments have been canvassed at length by the courts of appeals that have addressed this question, and the circuit conflict does not appear likely to resolve itself with the passage of time. Congress has given no indication that it is prepared to effect a legislative solution, and the two most recent appellate court decisions on the subject reached contrary results. See App., *infra*, 1a-14a; *Gallegos* v. *Lyng*, *supra*. Absent review by this Court, therefore, the present state of the law will likely remain unchanged. Because it is anomalous and inequitable for the federal government to be permitted to collect prejudgment interest from some States but not from others similarly situated, review by this Court is warranted.

2. The court of appeals erred in rejecting petitioners' claim to prejudgment interest from the State.

a. In *West Virginia* v. *United States*, 479 U.S. at 310, this Court reaffirmed "the longstanding [common-law] rule that parties owing debts to the Federal Government must pay prejudgment interest

[3] The Sixth Circuit's decision in *County of St. Clair* is unpublished. Nonetheless, that decision may be cited as precedent on the prejudgment interest issue within the Sixth Circuit, given the absence of published circuit precedent on that issue. 6th Cir. R. 24(c).

where the underlying claim is a contractual obligation to pay money," and applied that rule to a debt owed to the United States by a State. Nothing in the text or legislative history of the Debt Collection Act evinces any congressional intent to abrogate that common-law rule as applied to the debts of state and local governmental entities.

To be sure, those governmental entities are not "person[s]" subject to the Act's provisions for imposition of interest, 31 U.S.C. 3701(c), 3717, and thus the Act does not itself *authorize* the federal government to collect interest from them, but nothing in the Act suggests that it affirmatively *precludes* collection of prejudgment interest from state and local governments under other law.[4] Congress's mere refusal to legislate with respect to the interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in that area.

[4] The court of appeals reasoned that Section 3717(g)(1), which renders Section 3717 inapplicable "if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges," was intended to allow "Congress to legislatively pick and choose where the imposition of interest is necessary." App., *infra*, 12a. According to the court, Congress's failure to impose prejudgment interest under the Food Stamp Act in express terms is fatal to the federal government's claim. *Ibid.* In suggesting that Section 3717(g)(1) sheds light on the interest obligations of state and local govermental entities, however, the court of appeals ignored the fact that those entities are not subject to the provisions of Section 3717 in the first place. 31 U.S.C. 3701(c). The obvious purpose of Section 3717(g)(1) was to allow for case-specific avoidance of the requirements of Section 3717 in circumstances where it would otherwise apply, not to cover the situation of debtors already exempted from that Section.

The court of appeals rejected the common-law rule in reliance on what is, at most, an ambiguity created by the Act's inapplicability to state and local governments. In effect, the court reasoned that Congress affirmatively chose to create an incentive for state and local government debtors to delay payment of debts owed to the United States, and did so without any discussion or debate as part of a bill intended to *eliminate* incentives for such conduct. "[S]uch reticence while contemplating an important and controversial change in existing law is unlikely . . . . At the very least, one would expect some hint of a purpose to work such a change, but there was none." *Gallegos* v. *Lyng*, 891 F.2d at 799 (quoting *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979)).[5]

[5] The court of appeals was unpersuaded by the inconsistency between its result and the purposes of the Act, because it did "not agree that the states will have an incentive to shirk their debts incurred under the Food Stamp Act if no interest is allowed." App., *infra*, 11a. The court reasoned that the federal government could recover unpaid claims by withholding future payments to which the debtor State would otherwise be entitled. What the court failed to recognize, however, is that "the filing of a timely appeal and request for administrative review shall automatically stay the action of FNS to collect the claim asserted against the State agency." 7 C.F.R. 276.7(e). Thus, unless the federal government is permitted to charge prejudgment interest on state debts, a State would have an incentive to seek administrative review of all claims regardless of merit. Moreover, the fact that the Food Stamp Program may in some circumstances allow the federal government to reduce its losses by using the administrative offset procedure is not relevant to the statutory construction question at hand, because the ruling of the court below would apply across the board to all federal agencies and programs that lack express statutory authorization for the collection of prejudgment interest.

Thus, there is no basis for concluding that Congress affirmatively sought to overturn the settled common law in this area.[6] Accordingly, the common law should be given effect, pursuant to the well established rule that "[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). See also *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169-2170 (1991); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Env'tl Protection*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

b. The court of appeals also erred in failing to defer to the contemporaneous interpretations of the Act by the agencies charged with applying it. Pursuant to 31 U.S.C. 3711(e)(2), the Department of Justice and the General Accounting Office (GAO) are authorized to promulgate joint standards implementing the Act. Those agencies have consistently

[6] After enactment of the Act, Senator Percy, who sponsored the amendment excluding state and local governments from the definition of "person," opined that in his view the Act precluded imposition of prejudgment interest on those entities. As those courts that have considered the question have found, however, Senator Percy's *post hoc* views are not deserving of consideration, because there is absolutely no evidence that any other legislator was aware of or shared those views. App., *infra*, 9a; *Pennsylvania Dep't of Public Welfare* v. *United States*, 781 F.2d at 341 n.10. See generally *Bread Political Action Comm.* v. *Federal Election Comm'n*, 455 U.S. 577, 582 n.3 (1982); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 132 (1974).

viewed the Act as preserving the federal government's common-law right to seek prejudgment interest from state and local governments.

Shortly after the adoption of the Act, the GAO issued a ruling in which it concluded that the Debt Collection Act did not preclude the Department of Agriculture from relying on the common law to collect interest from state and local governments. See Decision No. B-212222 of the Comptroller General (Aug. 23, 1983), reproduced at App., *infra*, 32a-36a. The GAO later reaffirmed that position. See Letter from the Comptroller General to Senator Charles H. Percy (Jan. 5, 1984), reproduced at App., *infra*, 37a-45a.

The GAO and the Department of Justice conducted joint rulemaking proceedings to develop regulations implementing the Act. The question whether common-law remedies survived the Debt Collection Act was explicitly raised in those proceedings. 49 Fed. Reg. 8889, 8891, 8894 (1984). The agencies concluded that "the Government has a judicially recognized common law right to charge interest on its debts" and that "the common law right to charge interest continues to exist." *Id.* at 8894. Accordingly, the final regulations implementing the Act provide that while "[t]he provisions of 31 U.S.C. 3717 do not apply * * * [t]o debts owed by any State or local government," federal "agencies are authorized to assess interest and related charges on debts which are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority." 49 Fed. Reg. 8901 (1984), 4 C.F.R. 102.13(i).

The Act is, at a minimum, reasonably susceptible of the interpretation given it by the GAO and the Department of Justice. Because that agency interpretation is a reasonable one, judicial deference is required. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, Nos. 90-1419 & 90-1769 (Mar. 25, 1992), slip op. 9. The rule of deference applies with particular force here, where the agency interpretation is a contemporaneous construction of the Act reflected in the implementing regulations. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

c. The court of appeals found that imposition of prejudgment interest on the State was impermissible under *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981), apparently because the relevant statutes do not themselves require payment of interest. App., *infra*, 13a; see also *Arkansas* v. *Block*, 825 F.2d at 1258 n.7; *Perales* v. *United States*, 598 F. Supp. at 24. The court's ruling on that issue squarely conflicts with the decision of the Tenth Circuit in *Gallegos* v. *Lyng*, 891 F.2d at 799-800, and is also inconsistent with the approach taken in *Riles* v. *Bennett*, 831 F.2d 875, 877-878 & n.4 (9th Cir. 1987) (per curiam), cert. denied, 485 U.S. 988 (1988). As those cases correctly reasoned, *Pennhurst* does not forbid requiring States to pay prejudgment interest on debts incurred in the course of their participation in federal programs. Prejudgment interest does not constitute "a new obligation for participating States," but is instead one of "the remedies available against a noncomplying State," and thus does not run afoul of *Pennhurst*. *Bell* v. *New Jersey*, 461 U.S. 773, 790 n.17 (1983). Moreover, the federal government's common-law right to prejudgment interest must be deemed part of the backdrop against which all contracts with the United States are entered into, and thus an attempt to enforce that right

is not a "new obligation" imposed administratively on the States.

3. The issue raised in this petition is a recurring and important one, as is evidenced by the number of court of appeals decisions addressing the question.[7] Moreover, while this issue would be sufficiently important to warrant this Court's review even if it were confined to the Food Stamp Program alone,[8] the issue is likely to arise in a wide variety of cooperative state-federal welfare benefit programs which possess similar characteristics. See, *e.g.*, *Riles* v. *Bennett*, 831 F.2d 875, 876-878 & n.4 (9th Cir. 1987) (per curiam) (deciding similar issue in context of federal education grant program), cert. denied, 485 U.S. 988 (1988). The Office of Management and Budget advises us that federal program grant assistance to state and local governmental entities will amount to approximately $182 billion in fiscal year 1992 and $200 billion in fiscal year 1993. The final resolution of this issue will undoubtedly affect many of those programs.[9]

[7] The court of appeals erred in suggesting that a recent amendment to the Secretary of Agriculture's claims settlement authority, 7 U.S.C. 2022(a)(1), resolves the issue presented in this case for claims arising after November 28, 1990. App., *infra*, 8a. That amendment, which was added to the Food Stamp Act by the Hunger Prevention Act of 1988, Pub. L. No. 100-435, § 602, 102 Stat. 1674, was in fact made retroactive to October 1, 1985. § 701(b)(5)(B), 102 Stat. 1678 (codified at 7 U.S.C. 2012 note). That provision does not provide for prejudgment interest on all claims arising under the Food Stamp Program, as the court of appeals apparently believed, but instead imposes a specific limitation on the Secretary's ability to collect prejudgment interest on state debts arising under the Department's quality control program, 7 U.S.C. 2025(c)(1)(C). In quality control cases, if the state pursues an administrative appeal, interest will accrue only after the appellate administrative decision, or two years after the bill was received by the State, whichever occurs first. This limitation on prejudgment interest for a narrow class of Food Stamp Program debts arguably undercuts the court of appeals' ruling that Congress abrogated prejudgment interest for the entire program in 1982, and in any event provides no support for the suggestion that the issue presented in this petition has been legislatively resolved.

[8] The Food Stamp Program is the largest of the cooperative state-federal welfare benefit programs, benefiting fully one in ten Americans.

As this Court recognized in *West Virginia* v. *United States*, prejudgment interest is a remedy to make the parties whole by preserving the real value of the dollar amount in dispute. "Th[e] federal interest in complete compensation is likely to be present in any ordinary commercial contractual agreement between a State and the Federal Government. In such a situation, it is also difficult to imagine a state interest that would justify relieving the State of its obligation to compensate the Federal Government fully for its efforts." 479 U.S. at 311. The same considerations are present here.

[9] In this particular case, the Department of Agriculture stands to lose more than $106,000 in prejudgment interest on the debts at issue here. The Department believes it is losing over $1 million per year in prejudgment interest from the States in the Second, Third, Fifth and Eighth Circuits as a result of the unfavorable rulings in those circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1992

APPENDIX A

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

No. 91-8042

STATE OF TEXAS and TEXAS DEPARTMENT OF HUMAN RESOURCES, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA and U.S. DEPARTMENT OF AGRICULTURE, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Western District of Texas

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Jan. 28, 1992

Before CLARK, Chief Judge, JONES, Circuit Judge and PARKER*, District Judge.**

ROBERT M. PARKER, District Judge:

I.

The State of Texas and the Texas Department of Human Services (Texas) appeal from the District Court's Order granting summary judgment in favor

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* District Judge of the Eastern District of Texas, sitting by designation.

** This opinion was concurred in by Chief Judge Clark prior to his resignation from the Court on January 15, 1992.

of the United States, and the U.S. Department of Agriculture (United States), and awarding prejudgment interest against Texas for the amounts due to the United States. The Court below found that the Food Stamp Appeal Board's decision holding Texas liable for mail issuance losses is not subject to judicial review. Appellant also contends that the District Court erred in permitting the assessment of interest against the state. We affirm in part and reverse in part.

II.

Texas incurred losses in its Food Stamp Program due to U.S. Postal Service employees stealing food stamps that had been mailed by the Texas Department of Human Services to qualified households. These losses are referred to as mail issuance losses. Texas continued to distribute Food Stamps by mail even after it became apparent that losses were unacceptably high, for the purpose of assisting an investigation into the thefts and the prosecution of the thieves. Food Stamp Policy Memo, Index No. 85-04 addresses the question "Can a state agency be relieved from liability for mail issuance losses that occur during the course of a Postal Service investigation? The answer given by the Policy Memo is:

> "For normal or routine Postal Service investigation of mail theft, State agencies will not be relieved from liability for mail issuance losses. . . . However, in extraordinary circumstances where the success of a Postal Service's investigation into heavy food stamp mail issuance losses is contingent upon the State's cooperation by continuing its mail issuance system, requests for relief from liability will be considered on a case by case basis by the FNS Regional Administrator.

> To be considered, the state must present a convincing argument that it is only continuing with mail issuance in the affected area to cooperate with the Postal Service investigation, and it must make its request in advance of the conduct of the investigation."

Texas did not request a waiver of strict liability prior to the investigation as required in Policy Memo No. 85-04. In fact Texas claims the Department of Human Resources had no record of receiving a copy of the Policy Memo, nor did any Texas official have knowledge of the memo or its criteria for requesting a waiver prior to the investigation in this case. The Policy Memo was issued on November 30, 1984, and properly indexed in 1985, thus giving Texas official notice of its existence and contents.

Texas was notified by the United States that she would be liable for $150,350.00 for mail issuance losses incurred during April-September 1986 and for $262,035.00 for mail issuance losses incurred during October 1986-March 1987. Texas was advised that interest would accrue beginning thirty (30) days after notice.

Texas sought waivers of liability for mail issuance losses in hearings before the Food Stamp Board on each case. The Board determined that tolerance levels were exceeded and affirmed Texas' liability in both cases. The letter notifying Texas of the Food Stamp Board's decision commended Texas for its efforts to cooperate with the U.S. Postal Service in an attempt to curb the thefts. However, the board declined to waive Texas' liability, stating that the efforts were no greater than was to be expected. Texas then filed suit in district court for a *de novo* review of the Board's action.

III.

The Congress established the Food Stamp Program to improve the nutritional well-being of low income individuals who would have difficulty purchasing a nutritious diet. 7 U.S.C. § 2011 et seq. The Texas Food Stamp Program is administered jointly by the federal government and the Texas Department of Human Services. Eligibility and benefit standards for participation in the program are set by the Food and Nutrition Service (FNS) of the United States Department of Agriculture, 7 U.S.C. § 2014(b). The Secretary of Agriculture is authorized to issue such regulations as he deems necessary or appropriate for the efficient administration of the Food Stamp Program. 7 U.S.C. § 2013(c). The cost of the food stamps is borne entirely by the United States. The cost incurred by the participating state in the administration of the program is divided between the state and federal governments. 7 U.S.C. § 2025(a). The actual, day-to-day operation of the Texas program is carried out by the Texas Department of Human Services (TDHS). TDHS has authority to deliver the coupons to eligible individuals by mail or over-the-counter. Mail issuance is cheaper, administratively easier and preferred by many recipients who are housebound or without transportation. When Food Stamps are placed in the mail and not received, they must be replaced. If the original coupons and their replacements are both redeemed, the cost to the federal government doubles for that issuance. In 1981, Congress added a section to the Food Stamp Program providing that the States would be liable for mail issuance losses "to the extent prescribed in the regulations promulgated by the Secretary." 7 U.S.C. § 2016(f). The FNS adopted regulations es-

tablishing a tolerance level of .05% above which the participating state is held strictly liable for mail issuance losses. Losses up to .05% are absorbed by the U.S. regardless of fault. 47 Fed.Reg. 50682, 7 CFR 274.3.

The Secretary has discretion to waive a valid claim, if to do so would serve the purpose of the statute. 7 U.S.C. § 2022(a)(1). The Food Stamp Policy Memo, Index No. 85.04 describes extraordinary circumstances where relief from liability for mail issuance losses may be considered. The Board determined in this case that a waiver of Texas' liability, requiring the federal government to bear the entire loss would be contrary to the intent and purpose of the regulations. The letter from the Chairman of the Food Stamp Appeals Board advising Texas of the Board's decision concluded with the following language:

> "Should the State of Texas be aggrieved by this final determination, it may seek judicial review and trial *de novo* by filing a complaint against the United States. . ."

IV.

Texas sought judicial review. The District Court granted the Motion for Summary Judgment filed by the United States Department of Agriculture holding that Congress bestowed upon the Secretary of the Department of Agriculture complete discretion in the decision to forego an otherwise valid claim against the state. Therefore, the Department's decision regarding the appropriateness of waiver in a particular case is not subject to judicial review. Texas brings her first point of error challenging the appropriateness of the summary judgment order. Texas alleges that there was evidence before the court below raising

a genuine issue of fact as to whether or not the Food Stamp Appeals Board recognized their authority under the law to waive strict liability under these facts. The United States answers that, first, the Board's decision is commited to agency discretion by law, and no exploration of the Board's reasoning is allowed. Second, the Board *did* consider the State's waiver application and declined to grant the waiver. Third, the State never asked the Board to consider Policy Memo 85-04, and so cannot now complain that the Board did not expressly consider it. Finally, the application of Policy Memo 85-04 to the facts as recited by Texas would have made no difference to the outcome of the proceeding. We agree.

The Secretary of the Department of Agriculture is authorized to issue such regulations "as he deems necessary or appropriate for the efficient administration of the Food Stamp Program." 7 U.S.C. § 2013 (c). The strict liability scheme was a valid exercise of statutory authority under 7 U.S.C. § 2016(f). The Department has authority to waive claims pursuant to 7 U.S.C. § 2022(a)(1) if the Secretary determines that to do so would serve the purposes of this chapter.

An agency decision not to take enforcement action is presumed to be unreviewable in the courts unless Congress imposes explicit restrictions on the scope of agency enforcement discretion, and provides judicially manageable standards for determining when the agency has violated those restrictions. *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). Congress did not impose any restriction on the scope of agency discretion to grant waivers. There are thus no judicially manageable standards arising from the statute under which the Court can evaluate this case, because it involves an area in which Con-

gress empowered the agency with discretion to waive the charges it determines appropriate. The department's ultimate decision regarding appropriateness of a waiver in this particular case is not subject to judicial review. Texas argues, however, that Food Stamp Policy Memo, Index No. 85.04, created judicially manageable standards for determining if the agency abused its discretion. Even if this were true, we would not hold that the Food Stamp Appeals Board abused its discretion in failing to grant Texas relief under the Policy Memo. Texas was on constructive notice of the Policy Memo. Not only did the state not comply with that memo, but she failed to raise the applicability of the Policy Memo before the Food Stamp Appeals Board. We therefore affirm the the trial court's order granting summary judgment in this respect. We further find it unnecessary to undertake an analysis of whether or not the decision was arbitrary and capricious or an abuse of discretion.

V.

The Appellant next challenges the right of the Federal government to collect prejudgment interest on amounts owed by the state as a result of mail issuance losses in the Food Stamp Program. One circuit has allowed interest in this situation, *Gallegos v. Lyng*, 891 F.2d 788 (10th Cir.1989), while three other circuits have considered the issue and ruled that interest is not allowable. *Perales v. United States*, 751 F.2d 95 (2d Cir.1984) (per curiam), *affirming*, 598 F.Supp. 19 (S.D.N.Y.1984); *Pennsylvania Dep't of Public Welfare v. United States*, 781 F.2d 334 (3rd Cir.1986); *Arkansas by Scott v. Block*, 825 F.2d 1254 (8th Cir.1987). The Fifth Circuit has not addressed the issue.

At the heart of the controversy lies the interpretation of the Debt Collection Act of 1982, 31 U.S.C. § 3701, et seq. The act provides for interest against "persons" who owe past due debts to the United States. Section 3701 excludes from the definition of "persons" any agency of a state government. The exclusion under § 3701 does not prohibit interest assessments against state agencies in all circumstances. Congress is free to impose interest obligations by specific statutory authorization, as it has done in the Medicaid Act, 42 U.S.C. § 1396b(d)(5), and the Social Security Act, 42 U.S.C. § 418(j). However, the Food Stamp Act was silent on the issue of interest at the time the District Court entered its judgment. Congress has since amended 7 U.S.C. § 2022 adding that the State agency shall be liable for interest on any unpaid portion of a claim, and setting out the rate of interest and the time when it will begin to accrue. This amendment became effective on November 28, 1990, Pub.L. 101-624, § 1781(b)(2), fifteen days after judgment was entered in this cause, and therefore does not provide authority for the court's order in this cause. Neither party took the position before the District Court or this Court that the current interest provision in 7 U.S.C. § 2022 affects the outcome of this case.

Prior to the enactment of the Debt Collection Act of 1982, the courts had developed a body of common law to control when interest would be imposed. In the absence of an unequivocal prohibition of interest on statutory obligations, the Supreme Court fashioned rules which granted or denied interest by appraising the congressional purpose in imposing the specific obligation in light of "general principals deemed relevant by the Court." *Rodgers v. United States*, 332 U.S. 371, 68 S.Ct. 5, 92 L.Ed. 3 (1947). The District Court, relying on *Gallegos*, *supra*, found that the Debt Collection Act does not abrogate the federal government's common law right to assess interest on amounts owed by a state in this context. We disagree.

The language exempting state agencies from the Debt Collection Act was added to the bill on the Senate floor, and there is no available legislative history concerning it. Senator Percy, the author of the amendment, in a letter to the Comptroller General expressed his view that the Act was intended to abrogate the common law, and leave Congress free "to legislatively pick and choose according to circumstances, those situations in which the government might assess interest against those entities exempted by the Act." See *Pennsylvania Dep't of Public Welfare v. United States*, 781 F.2d 334, 341, n. 10 (3rd Cir.1986). An after the fact statement of a single legislator, even the amendment's author, is not entitled to probative weight in the determination of legislative intent. *Bread Political Action Committee v. Federal Election Com.*, 455 U.S. 577, 102 S.Ct. 1235, 71 L.Ed.2d 432 (1982); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). However, the interpretation articulated by Senator Percy is the only viable interpretation of the Debt Collection Act possible under the plain meaning of the statute.

The Appellees, like the Court below, rely on the reasoning expressed in *Gallegos v. Lyng*, 891 F.2d 788 (10th Cir.1989) to support their claim for interest.

First, the Eighth [*sic*] Circuit in *Gallegos*, *supra*, discusses the significance of *West Virginia v. United States*, 479 U.S. 305, 107 S.Ct. 702, 93 L.Ed.2d 639

(1987). The sole issue in *West Virginia* was whether the state was liable for prejudgment interest on a debt arising from a contract between the state and federal governments. The Court noted that the Debt Collection Act of 1982 was inapplicable because the claim arose under a contract entered into before October 25, 1982. The Court stated, "Moreover, we venture no opinion regarding the question whether this enactment [the Debt Collection Act of 1982] was intended to abrogate or leave intact the federal common law governing when a State must pay interest to the Federal Government." 479 U.S. at 312 n. 6, 107 S.Ct. at 707 n. 6, 93 L.Ed.2d 639. The *Gallegos* opinion notes that "while the Supreme Court expressly reserved the issue, its reference . . . to the relationship between the Debt Collection Act and the federal common-law right to collect interest at least suggests that the statute is not as ambiguous as appellant would have us find." 891 F.2d at 797. We decline to read anything into the *West Virginia, supra* opinion concerning the matter before this Court. That case simply reaffirmed the right of the Federal Government to prejudgment interest where the underlying claim is a contractual obligation entered into before the effective date of the act. The factual differences between that case and this one and the Court's express reservation of the issue before us precludes any reliance on the Supreme Court's ruling.

Second, the Eighth [*sic*] Circuit concluded, as we have, that there is no discernible legislative history to guide us with this question.

Third, having decided that the plain language of the statute and the lack of legislative history did not answer the question before them, the Court in *Gallegos* explored the purpose of the act itself. It discerned that the act was intended to tighten the collection process and create incentives for the timely payment of debts to the United States. It then concluded that to hold Congress to the literal meaning of their words and exempt state agencies from the payment of interest absent specific statutory authority to the contrary would create the absurd result of creating incentives for the nonpayment of state debts. We have no quibble with that statement of the purpose of the act. However, we do not agree that the states will have an incentive to shirk their debts incurred under the Food Stamp Act if no interest is allowed. The Food Stamp Act is a comprehensive legislative scheme for dividing financial responsibility for nutritional support for poor people between the States and the Federal Government. Under the Food Stamp Act state agencies are liable to pay the actual losses created by coupon shortages and unauthorized issuances. Unpaid claims for these losses can be recovered through offsets against the federal share of administrative funds to which the state agency is otherwise entitled. 7 U.S.C. §§ 2016(f) and 2022(a) and 7 C.F.R. 276. *Perales v. United States*, 598 F. Supp. 19 (S.D.N.Y.1984). The Congress was in the best position to decide the appropriate incentives or penalties to include in the Food Stamp Act. Congress elected not to include prejudgment interest in the initial statutory scheme. The Court cannot alter that decision. The 1990 amendment to the Food Stamp Act reaffirms our position that Congress does provide specific interest provisions where they are appropriate.

Fourth, the *Gallegos* opinion cites the principal that implied repeals of the common law are disfavored and should be found only where such a statutory pur-

pose is evident, citing *St. Regis Paper Co. v. United States*, 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961), and *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952). *Gallegos* characterizes their ruling allowing interest as an example of filling a gap left by Congress' silence in the Debt Collection Act of 1982. The Debt Collection Act is not silent concerning whether or not state obligations should be subject to prejudgment interest. The Act specifically excludes states from the payment of interest under the act. In § 3717(g)(1) the Act further specifies that the Act will not apply "if a statute, regulation required by statute, loan agreement or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges," thus allowing Congress to legislatively pick and choose where the imposition of interest is necessary. Having chosen clearly in the Food Stamp Act *not* to impose interest during the time period relevant in this case, the Courts are not free to "supplement" Congress' enactment. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978).

In further support of their conclusion, the Eighth [*sic*] Circuit noted that the General Accounting Office and the Comptroller General agreed with their construction of the statute, stating, "There is no evidence of congressional intent to prohibit . . . the assessment of interest and other charges against State and local governments when an agency of the Federal Government is acting pursuant to some other authority which may be available to it, whether founded in statute or common law." Decision of the Comptroller General (Aug. 23, 1983) at 2. We disagree with this interpretation of the statute and find neither persuasive reasoning nor precedent in the statement.

A final argument is addressed in the *Gallegos* opinion: whether interest improperly extends the terms and conditions under which the state had agreed to participate in the food stamp program in contravention of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.E.2d 694 (1981). *Pennhurst* held that legislation enacted pursuant to the spending power is much in the nature of a contract. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the states to exercise their choice knowingly, cognizant of the consequences of their participation. *West Virginia v. United States*, 479 U.S. 305, 107 S.Ct. 702, 93 L.Ed.2d 639 (1987) held that in the case of a contract between the state and the federal government, the federal courts are to determine the measure of damage, expressed in terms of interest, for nonpayment of the amount found to be due, *in the absence of an applicable federal statute*. Interest is an element of complete compensation. The purpose of interest is to make the injured creditor whole for the lost use of the money. Therefore, the Eighth [*sic*] Circuit found that *Pennhurst* did not bar the federal government's claim to prejudgment interest. The case before us, unlike *West Virginia*, *supra* involves an applicable federal statute. Therefore, this final argument also fails.

For these reasons, we hold that the Debt Collection Act of 1982 abrogated the federal common-law right to assess interest on outstanding debts of the states incurred under the mail issuance loss provision of the Food Stamp Act, prior to the November 28, 1990, amendment to the Act.

VI.

The District Court's order granting the United States' Motion for Summary Judgment is AFFIRMED.

The District Court's order that Texas pay prejudgment interest on the amount owed to the United States is REVERSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil No. A-87-CA-774
A-88-CA-820

STATE OF TEXAS, ET AL.

vs.

THE UNITED STATES OF AMERICA

ORDER

[Filed Nov. 13, 1990]

Before the Court is the Defendants' Motion for Summary Judgment, filed on November 8, 1989. The Plaintiffs filed a Brief in Opposition to Defendants' Motion for Summary Judgment on January 10, 1990, to which the Defendants filed a Reply on February 21, 1990. The Court has reviewed all of the motions on file in this cause, together with the exhibits and appendices attached thereto, and is of the following opinion.

In this action, the State of Texas [the "State" or the "Plaintiff"] challenges two decisions of the United States Department of Agriculture [the "Department" or the "agency" or the "Defendant"] which charge the State for the cost of replacing food stamp coupons

the State claims were stolen by employees of the United States Postal Service. In its first cause of action, the State seeks to challenge the application of a Department regulation which imposes strict financial liability on state food stamp agencies for the value, above a specified tolerance level, of food coupons lost through mail issuance.[1] In its Motion, the Defendant characterizes the Plaintiffs' first claim as a challenge to the validity of the regulation itself, but the Plaintiffs clarify in their Brief in Opposition that they challenge the strict liability nature of the regulation only as it applies to the State of Texas based on the facts presented here. The State concedes that "the Courts which have considered the issue of the validity of the mail loss regulation have consistently held that the statute gives the Secretary of Agriculture authority to prescribe the extent of a state's liability." *PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT*, at 7. The Plaintiffs' second claim is that the Department's refusal to exercise its statutory authority to waive mail loss penalties in this case constitutes an arbitrary and capricious abuse of discretion. Finally, in their third claim, the Plaintiffs seek to challenge the collection of interest by the Department on any amounts which are determined to be due from the State.

Under the statutory scheme adopted by Congress for the Food Stamp Program, the federal government

[1] The regulations adopted by the Food and Nutrition Service [FNS] to implement the mail loss statute are codified at 7 C.F.R. § 274.3. Interim regulations were adopted November 9, 1982. 47 Fed. Reg. 50681. The regulations were superceded by final regulations, adopted April 8, 1983. 48 Fed. Reg. 15223.

bears the entire cost of the food stamp coupons. The actual operation of the food stamp program is handled by the individual states, and the cost of administration is divided equally between the state and federal governments. 7 U.S.C. § 2025(a); 7 C.F.R. 272.2. The states are responsible for the "[i]ssuance, control and accountability" of the food stamps. 7 C.F.R. 271.4(a)(2). The states have available essentially two categories of options for distribution of the food stamp coupons, which are highly negotiable obligations of the United States, redeemable at face value. 7 U.S.C. § 2013. The states can deliver the stamps to recipients by mail or they can provide a reasonable method of over-the-counter distribution. 47 Fed. Reg. at 50681 (November 9, 1982).

Pursuant to its statutory authority, the Department made a decision to impose liability on the states for mail losses above 0.5%, below which the federal government would absorb the costs of issuing additional food stamps to cover those lost or stolen through the mail. The Department states that its objective was to establish a level that would "give State agencies a significant and realistic incentive to reduce mail losses, while taking care not to discourage mail issuance use where it is proving cost-effective and appropriate." 47 Fed. Reg. 50682. Recognizing that some portion of mail loss was unavoidable, the Department also asserts that one of its goals was to shift some portion of the cost of mail loses [*sic*] from the federal government to the states. *DEFENDANTS' MOTION FOR SUMMARY JUDGMENT*, at 21. The Department's application of the regulation and its corresponding 0.5% tolerance level resulted of mail loss charges of $150,350.00 for the State of Texas in 1986.

The Secretary of Agriculture is authorized to issue such regulations "as he deems necessary or appropriate for the efficient administration of the food stamp program." 7 U.S.C. § 2013(c). A challenge to the rulemaking activities of the Department is governed by the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* *See Rodway v. United States Department of Agriculture*, 514 F.2d 809, 817 n.14 (D.C. Cir. 1975). As stated, the State's first claim is a challenge to the Department's use of a strict liability standard for mail losses in its food stamp scheme. The challenged regulation was adopted by the Department pursuant to an express statutory command to shift some or all of the cost of food stamp mail losses to the states.[2]

The statutory authority is clear for the Department's enactment of a no-fault system of allocating losses incurred by the State's use of the mail to distribute food stamp coupons. In accordance with the concession by the State of the validity of the Department's authority to prescribe the extent of a state's liability, the Court finds that the strict liability scheme was a valid exercise of statutory authority under 7 U.S.C. § 2016(f). Based on the Plaintiff's concession, the Court does not find it necessary to elucidate further on this point. For further analysis as to the validity of the strict liability scheme of the food

[2] ". . . the State agency shall be strictly liable to the Secretary for any financial losses involved in the acceptance, storage and issuance of coupons . . . except that in the case of losses resulting from the issuance and replacement of authorizations for coupons and allotments which are sent through the mail, the State agency shall be liable to the Secretary to the extent prescribed in the regulations promulgated by the Secretary [of the Department]." 7 U.S.C. § 2016(f).

stamp program, *see Gallegos v. Lyng*, 891 F.2d 788 (10th Cir. 1989); *State of Arkansas By Scott v. Block*, 825 F.2d 1254 (8th Cir. 1987); *State of Missouri ex el David R. Freeman v. Block*, 690 F.2d 139 (8th Cir. 1982).

Although the Plaintiffs concede the validity of the Department's use of a strict liability scheme, they argue in their second claim that the scheme was misapplied in this case. Their argument rests on the Department's refusal to exercise its statutory authority to waive the charges against the State, which the State claims is an "arbitrary and capricious exercise of discretion." The Department argues that the proper standard for judicial review of the agency decision *not* to exercise its authority to waive the charges against the State is not the "arbitrary and capricious" standard because the decision is one that has been "committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2). The statutory authority under which the Department has authority to waive claims provides:

> The Secretary shall have the power to determine the amount of and settle and adjust any claim . . . arising under [the Food Stamp Act and or implementing regulations], . . . including the power to waive claims if the Secretary determines that to do so would serve the purpose of this chapter.

7 U.S.C. § 2022(a)(1). The Court finds that Congress intended to bestow upon the Secretary of the Department complete discretion in the decision to forego an otherwise valid claim against a state: "*if* the *Secretary determines* that to do so would serve the purposes of this chapter." *Id.*

In *Heckler v. Chaney*, 470 U.S. 821 (1985), the United States Supreme Court held that an agency decision *not* to take enforcement action is *presumed* to be unreviewable in the courts unless Congress imposes explicit restrictions on the scope of agency enforcement discretion and provides judicially manageable standards for determining when an agency has violated those restrictions. *See id.* at 830. The situation here is analogous to that in *Cheney* [*sic*] because both involve an agency's refusal to take requested enforcement action. The Court is of the opinion that the Department's decision in whether to waive an otherwise valid claim against the State is one "committed to agency discretion by law." For comparable holdings, *see Webster v. Doe*, 108 S. Ct. 2047, 2052 (1988) (finding that a statute which authorized the Director of the Central Intelligence Agency to terminate an employee "whenever the Director 'shall *deem* such termination necessary or advisable . . . ,' not simply when the dismissal *is* necessary or advisable," is a provision that "fairly exudes deference to the Director, and appears . . . to foreclose the application of any meaningful judicial standard of review"); *Gatter v. Nemmo*, 672 F.2d 343, 347 (3rd Cir. 1982) (finding that the refusal of the Veterans Administration to exercise statutory authority to renegotiate payment terms on defaulted mortgages was not subject to judicial review"); *Montgomery Ward & Co. v. Zenith Radio Corporation*, 673 F.2d 1254, 1262 (C.C.P.A. 1982), *cert. denied*, 459 U.S. 943 (1982) (holding that decision of the Secretary of the Treasury under a statute authorizing settlement of claims arising under customs laws was committed to agency discretion and stating that "[n]o situation is more within the category of 'no law to apply' than

the multifaceted judgmental decision to settle a claim").

In its Brief in Opposition, the Plaintiff argues that the Department's action in establishing procedures and criteria for the waiver process in its Food Stamp Program Policy Memo, Index No. 85-04, creates judicially manageable standards for determining whether the agency abused its discretion, and thus removed the waiver process from the type of action "committed to agency discretion by law." The Court does not find this argument persuasive, however. *Congress* did not impose any restriction on the scope of agency enforcement discretion that would remove decisions regarding waivers from the purview of the agency. There are no judicially manageable standards under which the Court can evaluate the instant case because it involves an area in which Congress empowered the agency with the discretion to waive the charges it "determines" appropriate. Therefore, the Court does not feel obligated to undertake an analysis of whether the Department's action constitutes an arbitrary or capricious abuse of discretion. However, the Court will consider the Plaintiffs' claims with respect to this issue in order to underscore the difficulty of judicial second-guessing of decisions which are committed to agency disecretion.

The Policy Memo referred to by the Plaintiffs is an explanatory statement accompanying the Department's 1986 pubiication of proposed revisions to the mail loss regulation. After explaining the Department's decision to maintain the existing policy of state liability for mail losses attributable to thefts by Postal Service employees, the Department indicated that it could "provide relief to the States where such is warranted." 51 Fed. Reg. at 12275. The Depart-

ment described the type of circumstances under which a waiver might be appropriate:

> For normal or routine Postal Service investigations of mail theft, State agencies will not be relieved from liability for mail issuance losses. . . . However, in extraordinary circumstances where the success of a Postal Service's investigation into heavy food stamp mail issuance losses is contingent upon the State's cooperation by continuing its mail issuance system, requests for relief from liability will be considered on a case by case basis by the FNS Regional Administrator. *To be considered*, the State must present a convincing argument that it is only continuing with mail issuance in the affected area to cooperate with the Postal Service investigation, and it must make its request in advance of the conduct of the investigation. The amount of liability waived will be only that amount of loss due to theft which is specifically documented in the investigation, and which occurred subsequent to the State's request for relief to FNS.

Id. (emphasis added).

The Court finds that the Department's statement did not create judicially manageable standards for review of waiver decisions. The Policy Memo may have articulated instances in which the Department would *consider* a waiver of charges, but the statement did nothing to restrict the agency's discretion in making the determination in a particlular case. In fact, the Policy Memo stated that waivers which met the threshold requirements of applying in advance of the losses and continuing with mail distribution only

to assist a postal service investigation would then be considered "on a case by case basis."

The State claims that the Department's decision to publish the waiver policy as a Policy Memo rather than a rule in the Federal Register caused the State to be unaware of the policy, and prevented the State from applying for a waiver in advance of its losses. The State claims that it never received the Policy Memo from FNS. Further, the State alleges that the State Food Stamp Appeals Board was unaware of the policy when it reviewed the validity of the State's claims in this case. It is on these bases that the State claims the Motion for Summary Judgment should be denied.

Under Federal Rule of Civil Procedure 56(c), summary judgment is to be granted if the record reveals no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding this question, the Court should view the evidence in the light most favorable to the party resisting summary judgment and should indulge all reasonable inferences in favor of that party. *See Pharo v. Smith*, 621 F.2d 656, 664 (5th Cir. 1980).

The State asserts "they would have qualified for a waiver because their cases met the criteria established in the policy memo." *PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT* at 16. The State goes on to claim that "[a]ny fair reading of the comments of the State Food Stamp Appeals Board suggests that they would have granted waivers except for their belief that they were prohibited by law from so doing." *Id.* at 18. The Court is of the opinion that the purported contested factual issues advanced by the State have no validity. The agency is required to

publish policy statements in the Federal Register only if they are general in nature: neither directed at specified persons nor limited to particular situations. *See Nguyen v. United States*, 824 F.2d 697, 700 (9th Cir. 1987); 5 U.S.C. § 551(a)(1)(D). The Policy Memo involved here is not general in nature, and the Department was not required to publish it in the Federal Register. Instead, the Department published the policy statement in the agency index, which was made available to the public as required under 5 U.S.C. § 552(a):

> (a) final order, opinion, *statement of policy* . . . may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—(i) it has been indexed and either made available or published as required by this paragraph; or (ii) the party has actual and timely notice of the terms thereof.

The Court agrees with the argument of the Department that "[i]f indexing alone is sufficient notice to a private citizen, then it is certainly more than sufficient notice to the agency of the State of Texas which administers the Food Stamp Program and, therefore, has an obligation to famiilarize itself with the federal policy. Since the statutory indexing requirement has been met, Policy Memo 85-04 can be relied upon as a basis for denying the State's request for a waiver, even if the State could prove that it never received a copy of the Policy Memo." *DEFENDANTS' REPLY TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT* at 8.

In response to the State's claim that it relied on erroneous advice from Department employees to the

effect that a waiver would not be granted under any circumstances, the Court agrees with the Defendant's characterization of the law: "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler v. Community Health Services of Crawford County*, 467 U.S. 51, 63 (1984). It was the State's responsibility to know and comply with the Department's policy regarding the waiver of mail issuance losses. *Cf. id.* at 64.

In its Motion for Summary Judgment and its Reply, the Department supports with thoroughness its argument that the State did not meet the qualifications for waiver, and furthermore, that the State "cooperation" in the instant case was not the type for which the Department would have granted a waiver even if the State had applied in advance of the losses. The Court does not feel it necessary to rehash the explanation offered by the Department for two reasons. First, as stated, the Court is of the opinion that the Department's decision regarding the appropriateness of a waiver in a particular case is not subject to judicial review. Second, even under the standard espoused as controlling by the State, the Court finds that the Department's decision in this case was hardly arbitrary or capricious. In fact, the Department has offered more than sufficient justification for the decision in its well-reasoned Motion and Reply. In addition to the fact that the Plaintiff did not request a waiver in advance of its losses, and did not continue mail issuance only to cooperate with a postal service investigation, the Department points out that "this is not a case in which the mail issuance system, but for a handful of thieves, is otherwise sound. On the contrary, the Texas mail

issuance loss rate is the highest of any state and is more than twice that of the next highest state." *DEFENDANTS' REPLY TO PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT* at 25. The rejection of a waiver for the State in this case advances the objective of encouraging states to take effective measures to reduce losses, and to consider whether the mail issuance system is the most effective means of distributing the food stamp coupons. As the Department argues in its motion, "The incentive to improve the issuance system would be destroyed by the routine waiver of liability in every case in which it can be proven that mail issuance losses were attributable to thefts by Postal Service employees." The Court finds that the Department's decision was clearly within the bounds of 5 U.S.C. § 706, and not arbitrary, capricious, or an abuse of discretion.

In its third cause of action, the State challenges the right of the Department to collect prejudgment interest on any amounts determined to be due from the State. The Department in its Motion has undertaken an extensive analysis of the judicial decisions of other circuits with respect to this issue, and argues that although three courts of appeal have held that the Department has no authority to charge interest on mail loss debts owed by the states, *see Perales v. United States*, 751 F.2d 95 (2d Cir. 1984) (per curiam), *affirming*, 598 F. Supp. 19 (S.D. N.Y. 1984); *State of Arkansas v. Block*, 825 F.2d 1254 (8th Cir. 1987); *Commonwealth of Pennsylvania Department of Public Welfare v. United States*, 781 F.2d 334 (3rd Cir. 1986), the most recent decision on this issue by the Tenth Circuit in *Gallegos v. Lyng*, 891 F.2d 788 (10th Cir. 1989) presents a superior

analysis of the legal issues involved. The Court is inclined to agree.

Objections to federal government collection of interest on amounts owed by states as a result of mail losses in the Food Stamp Program have been based on a number of grounds. In *Perales*, *supra*, the Second Circuit held that prejudgment interest was not available to the federal government because the Food Stamp Act did not explicitly authorize it. The holding was based on the Supreme Court's decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). The Department correctly points out, however, that the authority of the holding in this context has been limited by the Supreme Court's decision in *Bell v. New Jersey*, 461 U.S. 773 (1983). In *Perales*, the Second Circuit found that the payment of interest on amounts due from the states for mail losses constituted a "new condition" on states who participated in the Food Stamp Program, which was contrary to the Supreme Court's holding in *Pennhurst* that in cooperative federal-state programs, a state is required to comply only with terms and conditions which it knowingly and voluntarily accepted. In *Bell*, the Supreme Court explained that the *Pennhurst* rule governs "in the context of imposing an unexpected condition for compliance" and does not limit "remedies available against a noncomplying State." *Bell*, *supra*, 461 U.S. 773, 790 n.17. Like the Tenth Circuit in *Gallegos*, the Court is of the opinion that the distinction recognized in *Bell* applies to the instant facts. The Department seeks not to impose a new condition on the state for participation in the Food Stamp Program, but rather, seeks compensation for the State's breach of its duty to pay for mail losses above the tolerance level of 0.5%. Therefore,

the Court declines to follow the approach of the Second and Eighth Circuits with respect to this issue.

The State's second argument against collection of prejudgment interest provided the basis of the Third Circuit's decision in *Commonwealth of Pennsylvania Department of Public Welfare v. United States*, 781 F.2d 334 (3rd Cir. 1986). There, the Third Circuit held that the Debt Collection Act prohibited assessment of interest on debts owed by a state to the federal government.[3] In *West Virginia v. United States*, 107 S. Ct. 702 (1987), the Supreme Court clarified application of the Debt Collection Act when a federal statute did not contain explicit authorization for the assessment of interest: "In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for nonpayment of the amount found to be due." *Id.* at 705. In *Gallegos*, the Tenth Circuit undertook a comprehensive analysis of whether the Debt Collection Act operated to bar the federal government from collecting interest on debts owed from states participating in the Food Stamp Program, and held that the lack of an express provision in the Food Stamp Act authorizing collection of interest against a state in default does not preclude the agency from assessing interest as an element of compensation. The Tenth Circuit stated that the purpose of the interest is not to punish a debtor by imposing a new condition,[4] but rather to repay the creditor for the loss of

[3] For a detailed discussion of the Debt Collection Act in the context of the Food Stamp Program, *see Gallegos v. Lyng*, 891 F.2d 788 (10th Cir. 1989).

[4] This reasoning should provide adequate response to the Plaintiff's third argument against collection of interest, namely, that it would amount to a penalty against the State for pursuit of a judicial remedy. The Court does not find merit in the State's argument on this point.

the use of funds it rightly should have been paid. The Ninth Circuit reached the same conclusion on comparable facts in *Riles v. Bennett*, 831 F.2d 875 (9th Cir. 1987) *cert. denied*, 108 S. Ct. 1291 (1988). The Court finds the reasoning of these cases to be sound, and therefore adopts such reasoning to hold that the Debt Collection Act does not abrogate the federal government's common law right to assess interest on amounts owed from a state in this context.

ACCORDINGLY, IT IS ORDERED that the Defendant's Motion for Summary Judgment is hereby GRANTED, and further ORDERED that the State of Texas pay prejudgment interest on the amount owed to the federal government in this cause.

SIGNED AND ENTERED this 13th day of November, 1990.

/s/ James R. Nowlin
JAMES R. NOWLIN
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil No. A-87-CA-774
A-88-CA-820

STATE OF TEXAS, ET AL.

vs.

THE UNITED STATES OF AMERICA

JUDGMENT

[Filed Nov. 13, 1990]

Came on this day for consideration the Defendants' Motion for Summary Judgment, filed November 8, 1989; the Plaintiffs' Brief in Opposition, filed January 10, 1990; and the Defendants' Reply, filed February 21, 1990. After consideration of said motions, the Court is of the opinion that there is no genuine dispute as to material issues of fact in this cause.

ACCORDINGLY, IT IS ORDERED that the Defendant's Motion for Summary Judgment is hereby GRANTED; and further ORDERED that the State of Texas pay prejudgment interest on the amount owed to the federal government under the Food Stamp Program for mail losses above the tolerance level of 0.5%.

SIGNED AND ENTERED this 13th day of November, 1990.

/s/ James R. Nowlin
JAMES R. NOWLIN
United States District Judge

APPENDIX D

[SEAL]

THE COMPTROLLER GENERAL OF THE
UNITED STATES
WASHINGTON, D.C. 20548

DECISION

FILE: B-212222 DATE: August 23, 1983

MATTER OF: Debt Collection—Administrative Offset and Interest against State and local governments.

DIGEST: Sections 10 and 11 of the Debt Collection Act of 1982, 31 U.S.C. §§ 3716 and 3717, authorize use of administrative offset and assessment of interest and other charges when collecting debts owed to Federal Government by "persons." Statute further defines "person" as not including agencies of State or local governments. Absent any indication of contrary legislative intent, sections 10 and 11 are not exclusive and do not prohibit use of offset or charging of interest against State or local governments when and to the extent authorized by some other statute or under the common law.

The Department of Agriculture has requested our decision concerning the meaning and effect of sections 10 and 11 of the Debt Collection Act of 1982, 96 Stat. 1749, 1754-1756. The question is whether these sections prohibit the use of administrative offset and the assessment of interest, processing and handling fees, or late payment penalty charges on debts owed to the Federal Government by State and local governments. As is explained below, we think they do not. Instead, it is our opinion that the language at issue simply exempts debts owed by State and local governments from the requirements of sections 10 and 11 of the Debt Collection Act. Such debts are still subject to administrative offset or the assessment of interest and other charges whenever authorized by other statutes or principles of common law.

The Debt Collection Act of 1982 made several amendments to the Federal Claims Collection Act of 1966 (FCCA), 31 U.S.C. § 3701 *et seq.* (formerly 31 U.S.C. § 951 *et seq.*). Section 10 of the Debt Collection Act added a new section 5 to the FCCA which authorizes agencies to collect a claim from a "person" by means of administrative offset. Section 11 amended section 3 of the FCCA to direct agencies to assess interest, processing and handling charges, and penalties on debts owed by "persons" under certain circumstances. Sections 10 and 11 have been codified as 31 U.S.C. §§ 3716 and 3717 respectively. Pub. L. No. 97-452 (January 12, 1983), 96 Stat. 2467, 2471-72.

Sections 10 and 11 by their terms applied only to debts owed by "persons," and both sections expressly provided, in virtually identical language, that "person" does not include any agency of the United States or of "any State or local government." 96 Stat. 1755 and 1756. These definitions have been combined and codified as 31 U.S.C. § 3701(c). According to Agriculture, some State and Federal agencies have construed this definition to mean that Congress intended to completely prohibit the Federal Government from using administrative offset or assessing interest (and the other charges specified) on debts owed by agencies of State or local governments. Agriculture has taken the position, however, and we agree, that the

restrictive definition contained in sections 10 and 11 does not prohibit Federal agencies from continuing to use administrative offset or assessing interest and other charges, pursuant to the common law or other statutory authority.[1]

We first considered the meaning of this definition in a letter to the Department of Justice, B-209669, December 17, 1982. In that letter, we noted that the legislative history of the Debt Collection Act does not disclose any explanation of the meaning or purpose of these provisions. It appears that the definition of "person" was inserted into sections 10 and 11 of the Act after the Senate and House bills were reported out of committee. The floor debates do not shed any additional light on the matter. Consequently, we have only the plain language of the Act to guide us.

In our view, this restrictive definition merely exempts those entities not included in the definition of "person" from the provisions of sections 10 and 11 of the Debt Collection Act. Those sections authorize or require certain actions to be taken with regard to debts owed by "persons;" yet State and local governments are not "persons" within the meaning of those sections. Consequently, those sections do not apply to debts owed by State and local governments. There is no evidence of congressional intent to prohibit the use of administrative offset or the assessment of interest and other charges against State and local governments when an agency of the Federal Government is acting pursuant to some other authority which may

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[1] *See, e.g., United States v. Munsey Trust Co.*, 332 U.S. 234 (1947) (common law right of setoff); *Young v. Godbe*, 82 U.S. (15 Wall.) 562, 565 (1873) (common law right to interest).

be available to it, whether founded in statute or common law.

In addition, section 10 expressly provides that it will not apply to any case in which another statute explicitly provides for or prohibits the use of administrative offset to collect claims owed to the United States. 31 U.S.C. § 3716(c)(2). Section 11 contains a similar proviso with regard to the assessment of interest and other charges authorized by that section. 31 U.S.C. § 3717(g)(1). Those two provisos clearly demonstrate that Congress did not intend, by the passage of sections 10 and 11, to repeal by implication any other pre-existing statutes which authorize or govern the use of offset or the assessment of interest and other charges. *Compare Morton v. Mancari*, 417 U.S. 535, 550 (1974).

Moreover, we presume that had the Congress intended to impose a comprehensive prohibition which impliedly repealed or abrogated common law principles concerning the use of administrative offset or the assessment of interest and other charges against all entities not covered by sections 10 and 11, it would have provided statutory language, or at least legislative history, to clearly express such a purpose or reasonably support such a construction. As the Supreme Court said in *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952):

> "Statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."

As noted above, the legislative history is silent as to the intended impact of the definition of "person." "This silence is most eloquent, for such reticence

while contemplating an important and controversial change in existing law is unlikely. * * * At the very least, one would expect some hint of a purpose to work such a change, but there was none." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979). *See also United States v. Bellard*, 674 F.2d 330, 335 (5th Cir. 1982). Accordingly, we conclude that sections 10 and 11 do not abrogate the common law beyond the extent required by their terms.

For these reasons, it is our opinion that, to the extent that there is authority other than sections 10 and 11 of the Debt Collection Act of 1982 (whether founded in statute or common law), agencies of the Federal Government are authorized to use administrative offset, and to assess interest or other authorized charges against State and local governments, in order to collect debts owed to the United States. B-209669, December 17, 1982. *See also* 62 Comp. Gen. —— (B-210086, July 28, 1983).

/s/ Harry R. Van Cleve
for Comptroller General
of the United States

[SEAL]

COMPTROLLER GENERAL
OF THE UNITED STATES
Washington, D.C. 20548

B-212222 January 5, 1984

The Honorable Charles H. Percy
United States Senate

Dear Senator Percy:

This is in response to your letter of November 21, 1983 (which we received on December 5), concerning the effect of sections 10 and 11 of the Debt Collection Act of 1982[1] on the Government's common law rights to use administrative offset and to assess interest with respect to debts owed to the United States by state and local governments. As you know, it is our position that the Debt Collection Act does not abrogate preexisting common law rights beyond the extent required by its terms. We stated this position in a letter to the Department of Justice (B-209669, December 17, 1982) and in a decision to the Department of Agriculture (B-212222, August 23, 1983). You question the basis for our position.

At the outset, we note that the issue has been raised in a lawsuit filed against the Department of Labor.[2] The suit challenges the Labor Department's

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[1] Pub. L. No. 97-365 (October 25, 1982), 96 Stat. 1749. Sections 10 and 11 have been codified as 31 U.S.C. §§ 3716 and 3717. For consistency, references in this letter will be to the original enactment.

[2] *State of South Carolina CETA Consortium and Gloucester County, New Jersey v. Raymond J. Donovan*, United States District Court for the District of Columbia, Civil Action No. 83-1518.

authority to assess interest against state and local governments in view of section 11 of the Debt Collection Act, which the plaintiffs argue amounts to a prohibition. While the suit deals solely with interest and does not involve offset, the result will presumably be equally applicable to the interpretation of both sections 10 and 11. In view of this pending litigation, we think it would be inappropriate for us to formally reconsider our position at this time. However, it might be helpful to explain our position in somewhat more detail.

The Government has long asserted its right to use administrative offset and its right to assess interest, without the need for specific statutory authority. The Supreme Court has recognized these rights, and they have become important elements of the Government's debt collection activities.

With respect to administrative offset, the Supreme Court has stated that "[t]he government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him' (citations omitted)." *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947). See also *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 140 (1962); *Barry v. United States*, 229 U.S. 47 (1913); McKnight v. United States, [*sic*] 98 U.S. 179 (1878), *affirming* 13 Ct. Cl. 292 (1877); *Gratiot v. United States*, 40 U.S. (15 Pet) 336 (1841).

Similarly, the Court has sanctioned the Government's common-law right to assess interest on indebtedness. *Billings v. United States*, 232 U.S. 261 (1914); *Royal Indemnity Co. v. United States*, 313 U.S. 289 (1941). Where the debtor is a unit of state or local government, considerations of equity become more relevant (*Board of Commissioners v. United*

States, 308 U.S. 343 (1939)), but the basic right still does not depend on the existence of statutory authority.

Against this background, the Congress addressed both topics—administrative offset and interest—in section [*sic*] 10 and 11 of the Debt Collection Act. Both sections spoke in terms of debts owed by "persons," and both sections provided that the term "person" did not include units of state or local government.[3]

When we first considered the proper interpretation of the exclusions in sections 10 and 11 for state and local governments, we recognized that two approaches were possible. First was to view sections 10 and 11 as preempting their respective fields. Under this approach, the common law would be entirely replaced by the new legislation, and the exclusions for state and local governments would amount to prohibitions. The second approach was to view sections 10 and 11 as supplanting the common law only to the extent required by their terms, and to view the exclusions merely as exemptions from the new statutory provisions and procedures.

In adopting the latter approach, we applied the established principle of statutory construction that "Statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). To support this proposition, we cited the Isbrandtsen case in our August decision, along with *Edmonds v. Compagnie Generale Transatlantique*,

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[3] Section 5(e) of the Federal Claims Collection Act of 1966, added by Pub. L. No. 97-365, § 10(2), and section 3(e)(8) of the Federal Claims Collection Act of 1976, added by Pub. L. No. 97-365, § 11. The subsections have been combined and codified as 31 U.S.C. § 3701(c).

443 U.S. 256, 266-67 (1979) and *United States v. Bellard*, 674 F.2d 330, 335 (5th Cir. 1982). Numerous other cases exist to support this principle, for example, *United States v. Tilleraas*, 709 F.2d 1088 (6th Cir. 1983); *Copeland v. Martinez*, 603 F.2d 981 (D.C. Cir. 1979); *Amoco Oil Co. v. EPA*, 543 F.2d 270 (D.C. Cir. 1976); *California-Western States Life Ins. Co. v. Sanford*, 515 F. Supp. 524 (E.D. La. 1981).

The case of *Copeland v. Martinez, supra*, provides a useful illustration. Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), authorizes courts in employment discrimination suits to award reasonable attorney fees to "the prevailing party, other than * * * the United States." The court concluded that the exempting language excluded the United States only from the *statutory* allowance of fees, and that it left undisturbed the common-law authority to award fees when a suit has been brought in bad faith. Thus, the court held that section 706(k), notwithstanding the exempting language, does not preclude a court from awarding attorney fees to the United States when it has been sued in bad faith. This result, the court noted, was fully consistent with the statutory purpose.

Thus, our position is based on a recognized concept of statutory construction. We did not, however, apply the rule of construction blindly. We applied it only after a careful analysis of the statutory language, the legislative history, and the overall legislative purpose. In our view, these three factors, which we will comment on in more detail, all support our conclusion.

The Debt Collection Act does not provide that "an agency may not use administrative offset to collect amounts owed by units of state and local government." It does not provide that "interest shall not be assessed against units of state or local government." It provides merely, as noted above, that the term "person" for purposes of sections 10 and 11 does not include units of state or local government. Thus, language could easily have been used to make it clear that the exclusions were to operate as prohibitions. Yet this language was not used, and the language actually employed does not compel this result.

As we stated in our August decision to the Department of Agriculture, the legislative history fails to provide guidance. The exclusionary language of sections 10 and 11 did not appear in the reported version of S. 1249 or H.R. 4613, the bills which became the Debt Collection Act. Thus, there is no relevant discussion in the committee reports. The exclusionary language appeared as part of an amendment which you proposed on September 27, 1982. We reviewed the relevant Senate and House floor debates and similarly found nothing to suggest that the exclusions were designed to operate as prohibitions.

It is true, as you note, that witnesses at hearings on H.R. 4614 in June and July 1982 [4] expressed concerns over how offset and interest might apply to debts owed by state and local governments. While H.R. 4614 is an unreported bill and was not one of the bills enacted as the Debt Collection Act, the hearings can be regarded as part of the overall legislative history in a broader sense. In response, we would note that the witnesses did not necessarily seek absolute

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[4] *Collection of Debts Owed the United States*, Hearings on H.R. 4614 before the Subcommittee on Administrative Law and Governmental Relations, House Committee on the Judiciary, 97th Cong., 2d Sess. (1982).

prohibitions. They were concerned with such things as clarification of definitions and procedural safeguards. While there may well have been a connection between this testimony and the ultimate insertion of the exclusions, we still found no legislative history to warrant concluding that the exclusions should be viewed as prohibitions. In addition, other witnesses at those hearings (for example, the representatives of the Department of Health and Human Services) specifically included debts of state and local governments in their presentations.

There are several possible explanations for the exclusionary provisions consistent with treating them as exemptions rather than prohibitions. For example, a major purpose of section 10 was to provide due process protections. The Supreme Court has held that states are not "persons" for purposes of the Due Process Clause of the Fifth Amendment.[5] The section 10 exclusion could simply have been a recognition of this. Alternatively, the section 10 exclusion could have reflected a view that the subject of indebtedness by state and local governments presented complexities best left to existing remedies or possibly dealt with in future legislation.

The same is true for interest. Section 11 authorizes the assessment of penalties and administrative costs as well as interest. The section 11 exclusion could have reflected a desire that penalties and administrative costs, which were not authorized under common law, should not be assessed against state and local governments, but that existing common law with respect to interest need not be disturbed.

[5] "The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court." *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). See also *The Constitution of the United States of America, Analysis and Interpretation*, S. Doc. No. 92-82, 92d Cong., 2d Sess. 1139 (1973).

You also note your concern over student loan defaulters. While we recognize that this was a major concern not only of yours but of all those involved in the process culminating in the Debt Collection Act, we found no indication that this concern should be viewed as excluding other types of indebtedness.

It has often been noted that a series of GAO reports starting in 1978 helped generate the awareness that led to the introduction of legislation to faciiitate collection of debts. See, for example, the report of the Senate Committee on Governmental Affairs on S. 1249, S. Rep. No. 97-378, page 2 (1982). Our reports dealt with indebtedness of state and local governments as well as other types of debts. *E.g., Federal Agencies Negligent in Collecting Debts Arising From Audits*, AFMD-82-32, January 22, 1982. An August 1982 report by the House Committee on Government Operations (Failure of Federal Departments and Agencies to Collect Audit-Related Debts, H.R. Rep. No. 97-727) cited our January report and discussed with approval the use of offset and the charging of interest with respect to audit-related debts. Although audit-related debts often involve state and local governments, the report drew no such distinction. While the report is not "direct" legislative history of the Debt Collection Act, it is nevertheless relevant as a contemporaneous congressional document expressing the views of at least its issuing committe on the same subject matter. In particular, this report demonstrates that, at that time, one of the committees which participated in and supported the passage of the Debt

Collection Act believed that adequate legal authority existed prior to and independent of the passage of the act to support the assessment of interest and the use of administrative offset against audit related debts in general, including those owed by units of state and local government.

Finally and perhaps most importantly, the major purpose of the Debt Collection Act of 1982 was "to facilitate substantially improved collection procedures in the federal government." S. Rep. No. 97-378, page 1. To construe the exclusions of sections 10 and 11 as prohibitions would not only result in the unavailability of the new statutory procedures, it would also result in a serious erosion of existing authority and would leave Federal agencies in a worse position than they were in before the legislation was enacted. We saw at the time, and continue to see, no compelling reason to do this. Our position—that the exclusions should be taken at face value and should be construed as doing nothing more than exempting state and local governments from sections 10 and 11 of the act—is, we believe, more consistent with the purpose of the statute.

As you have noted, many other Federal agencies share our view. One agency submitted the following comment:

> "The Department believes that the proposed rule must address, in an unambiguous manner, the fact that the Debt Collection Act of 1982 in no way abrogated pre-existing common law debt collection rights. * * *
>
> "The legislative history of P.L. 97-365 provides no guidance on the intent of Congress in excluding these debts from coverage under the Act. However, in order to fulfill the basic intent of the

> Act, that is to enhance the federal government's ability to collect its debts, it is essential that the proposed rule make clear what obviously must have been the Congressional purpose: to add to already existing claims collection authorities additional means to accomplish that intent. Thus, it is the Department's belief that the intent of Congress in passing the Debt Collection Act was to enact legislation which would, in addition to granting federal agencies authority to undertake certain claims collection activities not previously authorized (*e.g.*, offset of general debts from federal employees salaries), primarily facilitate, encourage and direct the agency's utilization of previously available claims collection mechanisms (*e.g.* administrative offset, use of credit reporting agencies and private collection agencies, assessment of interest). The Department believes that any other interpretation would effectively abrogate the purpose of Congress in passing the Debt Collection Act of 1982."

In sum, the issue is currently in litigation and we will of course reconsider our position if warranted by the results of that litigation. However, we feel that the position we have taken is reasonable, legally supportable, and consistent with the purpose of the Debt Collection Act.

Sincerely yours,

/s/ Harry R. Van Cleve
for Comptroller General
of the United States

APPENDIX E

STATUTES AND REGULATION INVOLVED

1. 31 U.S.C.:

§ 3701. Definitions and application

* * * * *

(c) In sections 3716 and 3717 of this title, "person" does not include an agency of the United States Government, of a State government, or of a unit of general local government.

* * * * *

§ 3717. Interest and penalty on claims

(a)(1) The head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point. The Secretary of the Treasury shall publish the rate before November 1 of that year. The rate is effective on the first day of the next calendar quarter.

(2) The Secretary may change the rate of interest for a calendar quarter if the average investment rate for the 12-month period ending at the close of the prior calendar quarter, rounded to the nearest whole percentage point, is more or less than the existing published rate by 2 percentage points.

(b) Interest under subsection (a) of this section accrues from the date—

(1) on which notice is mailed after October 25, 1982, if notice was first mailed before October 25, 1982; or

(2) notice of the amount due is first mailed to the debtor at the most current address of the debtor available to the head of the executive or legislative agency, if notice is first mailed after October 24, 1982.

(c) The rate of interest charged under subsection (a) of this section—

(1) is the rate in effect on the date from which interest begins to accrue under subsection (b) of this section; and

(2) remains fixed at that rate for the duration of the indebtedness.

(d) Interest under subsection (a) of this section may not be charged if the amount due on the claim is paid within 30 days after the date from which interest accrues under subsection (b) of this section. The head of an executive or legislative agency may extend the 30-day period.

(e) The head of an executive or legislative agency shall assess on a claim owed by a person—

(1) a charge to cover the cost of processing and handling a delinquent claim; and

(2) a penalty charge of not more than 6 percent a year for failure to pay a part of a debt more than 90 days past due.

(f) Interest under subsection (a) of this section does not accrue on a charge assessed under subsection (e) of this section.

(g) This section does not apply—

(1) if a statute, regulation required by statute, loan agreement, or contract prohibits its charging interest or assessing charges or explicitly fixes the interest or charges; and

(2) to a claim under a contract executed before October 25, 1982, that is in effect on October 25, 1982.

(h) In conformity with standards prescribed jointly by the Attorney General and the Comptroller General, the head of an executive or legislative agency may prescribe regulations identifying circumstances appropriate to waiving collection of interest and charges under subsections (a) and (e) of this section. A waiver under the regulations is deemed to be compliance with this section.

2. 4 C.F.R.:

§ 102.13. Interest, penalties, and administrative costs.

* * * * *

(i) *Exemptions.* (1) The provisions of 31 U.S.C. 3717 do not apply: (i) To debts owed by any State or local government;

* * * * *

(2) However, agencies are authorized to assess interest and related charges on debts which are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45414

(2)

NO. 91-1729

****

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

****

UNITED STATES OF AMERICA, ET AL,
Petitioners

v.

STATE OF TEXAS, ET AL,
Respondents

****

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

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Executive Assistant Attorney General

JORGE VEGA, Chief
General Litigation Div.

EDWIN N. HORNE
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OF COUNSEL

JAMES C. TODD, Chief
Appellate Division
COUNSEL OF RECORD

QUESTIONS PRESENTED

Whether the Secretary of Agriculture's unilateral imposition of liability on a State for direct mail delivery losses under the Food Stamp Act is a contractual debt subject to prejudgment interest, or a penalty and not subject to prejudgment interest.

Whether the Fifth Circuit was correct in its determination that the Debt Collection Act abrogated prior common law permitting awards of prejudgment interest against the States.

Whether awarding prejudgment interest against the State of Texas would violate the principles of *Pennhurst State School & Hospital v. Halderman,* where the Food Stamp Act does not provide for prejudgment interest on discretionary penalties awarded against a State, and the Debt Collection Act expressly exempts the States from prejudgment interest.

Whether the Fifth Circuit was correct in its decision not to defer to the United States Department of Justice and the General Accounting Office in their interpretation of § 3701(c) of the Debt Collection Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES CITED

NO. 91-1729

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

****

UNITED STATES OF AMERICA, ET AL,
Petitioners

v.

STATE OF TEXAS, ET AL,
Respondents

****

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Debt Collection Act of 1982, Pub. L. No. 97-365, § 11, 96 Stat. 1755-1756, as amended, 31 U.S.C. §§ 3701(c), 3714, 3716, and 3717, the regulations promulgated thereunder, 4 C.R.F. 102.13(i), pertinent provisions of the Food Stamp Program, 7 U.S.C. § 2016(f), and the regulations promulgated thereunder, 7 C.F.R. §§ 276.1 and 276.2.

STATEMENT OF THE CASE

Respondents accept in general the factual description presented by Petitioner, with the following addendum concerning the Food Stamp Program, 7 U.S.C. §§ 2011 et seq.. The Food Stamp Program is a program administered

jointly by the Federal and State Governments in which state agencies (in Texas the Texas Department of Human Services) make eligibility determinations and authorize low-income households to obtain food stamp coupons. The coupons themselves are obligations of the Federal Government and are redeemable at face value by providers. The coupons are delivered to the State agency by the United States Department of Agriculture.

The Act provides that liability may be imposed upon the State by the Secretary for failure by the State to properly execute the administrative functions associated with eligibility determinations and distribution of coupons. In most cases such liability is contingent upon a finding by the secretary that the State was negligent or otherwise at fault. 7 U.S.C. § 2020(h). The statute has, however, long held States strictly liable for the "acceptance, storage and issuance" of the food stamp coupons. However, the original law provided that if the coupons were distributed to households through the U. S. Mail, the State's liability ended once the coupons were put into possession of the United States Postal Service. Accordingly, States adopted strict security measures with respect to the storage and transportation of the coupons while the coupons were in the custody and control of the State or its agents. None of the losses which resulted in State liability being challenged in this case resulted from losses which occurred while the coupons were in the custody and control of the State or any of its agents.

In 1981, the Food Stamp Act was amended permitting the Secretary to make States liable to some degree for mail issuance losses. 7 U.S.C. § 2016(f). The regulatory scheme adopted by the Secretary recognized that mail issuance losses were an exception to the strict liability applicable to other issuance activities. Nevertheless, the Secretary unilaterally

established a "tolerance level" for losses above which States would be held strictly liable without regard to any fault on the part of the State or its agents, nor would the State be permitted to demonstrate fault on the part of any third party. 7 C.F.R. § 276.2(b)(2)(4).

Understandably, following the adoption of interim rules on this subject, many States took issue with various aspects of the Secretary's regulations and recommended that State agencies not be held accountable for mail issuance losses directly related to Postal Service operations. 48 Fed. Reg. 15225. On April 9, 1986, the Department of Agriculture published proposed rules in which the Secretary clearly and unambiguously indicated that the Food and Nutrition Service would adjust claims for mail issuance losses where such relief was warranted. The criteria for determining when such relief would be warranted specifically made reference to a situation in which the State continued to issue food stamp coupons through the mail in order to aid an investigation by the U.S. Postal Service or other law enforcement agencies into heavy mail issuance losses. See 51 Fed. Reg. 12268, at 12275.

REASONS FOR DENYING THE WRIT
ARGUMENT

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE SECRETARY'S UNILATERAL IMPOSITION OF LIABILITY ON A STATE FOR DELIVERY LOSSES UNDER THE FOOD STAMP ACT IS NOT A CONTRACTUAL DEBT SUBJECT TO PREJUDGMENT INTEREST, BUT RATHER A PENALTY NOT SUBJECT TO PREJUDGMENT INTEREST.

The obligation of Texas to pay money to the United States is a result of a unilateral decision by the Secretary of Agriculture. The decision to impose strict liability for direct mail delivery losses above an arbitrary "tolerance level" in the U.S. Postal Service was unilateral and a complete reversal of prior law. *State of Texas v. United States*, 951 F.2d 645, 648-49 (5th Cir. 1992); *Gallegos v. Lyng*, 891 F.2d 788, 789 (10th Cir. 1992). There were no arm's length negotiations between the Secretary and the States. The imposition of the obligation to pay was purely discretionary with the Secretary and, as the court below held, is not subject to judicial review. If the obligation were a debt created by a contractual arrangement, judicial review of disputes arising from that contractual relationship would be required. Moreover, the imposition of strict liability for delivery losses over the tolerance level for use of the U.S. Postal Service was opposed by many States, including Texas. 51 Federal Register 12268. This liability operates as a penalty for losses due to the actions of third parties; it is punitive and meant to force the States to adopt alternate and much more costly distribution schemes for the

delivery of food stamps, and is not an effort to disgorge monies illegally diverted from the Food Stamp Act.

Accordingly, the "debt" on which the United States seeks to collect interest, pursuant to federal common law, is not a debt created by some contractual agreement requiring prejudgment interest for full and complete compensation for that debt. See *West Virginia*, 479 U.S. 305, 107 S.Ct. 702 (1987). Rather, it is a penalty, and as such is not subject to prejudgment interest. *Rodgers v. United States*, 332 U.S. 371, 374-76, 68 S.Ct. 5, 7-8 (1947).

To permit prejudgment interest on the unilateral imposition of a liability is an improper use of the spending power of Congress, and violates the contract doctrine enunciated in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981). Any condition or penalty on the grant of federal funds to the States must be made unambiguously to permit a knowing acceptance of the liability. See Section III., *infra*.

The inapplicability of prejudgment interest to a penalty or noncontractual debt is not a change in federal law. Because prejudgment interest is not available for this liability, it is unnecessary to reach the issue *infra* of whether Congress abrogated the common law in passing the Debt Collection Act, 31 U.S.C.A. § 3701 *et seq.*.[1]

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[1] The Circuit Courts are split on this issue.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE FIFTH CIRCUIT WAS CORRECT IN ITS DETERMINATION THAT THE DEBT COLLECTION ACT ABROGATED ANY PRIOR COMMON LAW PERMITTING AWARDS OF PREJUDGMENT INTEREST AGAINST THE STATES.

The Food Stamp Act, 7 U.S.C. § 2001 *et seq.*, is silent as to the imposition of prejudgment interest on claims against the States.[2] The Debt Collection Act, 31 U.S.C. §3701 *et seq.*, expressly exempts the States from its provision imposing prejudgment interest on claims owed the Federal Government.[3] The Secretary maintains that the USDA is permitted nonetheless to impose prejudgment interest pursuant to federal common law. *West Virginia v. United States*, 479 U.S. 305, 107 S.Ct. 702 (1987). In particular, the Secretary maintains that the enactment of § 3701(c), which expressly exempts the States from prejudgment interest, did not expressly prohibit the imposition of prejudgment interest on the States, and therefore § 3701(c) did not abrogate prior

[2] Section 2022 was amended in November of 1990, subsequent to the judgment in the District Court, expressly providing for prejudgment interest for claims brought under the quality control provisions of § 2025 of the Food Stamp Act.

[3] Section 3701(c) provides: "In sections 3716 and 3717 of this title, 'person' does not include an agency of the United States Government, of a State government, or of a unit of general local government."

federal common law permitting such interest. In contrast, Respondent agrees with the Fifth Circuit that Congress expressly addressed the issue, thus abrogating the federal common law; Congress does not have to expressly and affirmatively act in order to abrogate federal common law. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 315, 101 S.Ct. 1784, 1791 (1981).

The focus of this dispute is the correct interpretation of § 3701(c) of the Debt Collection Act. The Fifth Circuit held that the intent of Congress was to exempt the States from prejudgment interest unless expressly authorized by statute. *State of Texas*, 951 F.2d at 651. *See also*, *Perales v. United States*, 751 F.2d 95 (2nd Cir. 1984) (per curiam), affirming, 598 F.Supp. 19 (S.D.N.Y. 1984); *Penn. Dept. of Public Welfare v. United States*, 781 F.2d 334 (3rd Cir. 1986); *Arkansas by Scott v. Block*, 825 F.2d 1254 (8th Cir. 1987). *But see*, *Gallegos v. Lyng*, 891 F.2d 95 (10th Cir. 1989); *County of St. Clair v. United States Dept. of Labor*, 754 F.2d 375 (6th Cir. 1984) (Table). Petitioner maintains that this express statutory exemption from prejudgment interest does not equate with an abrogation of the common law permitting prejudgment interest, that prohibiting the States from prejudgment interest is contrary to the purposes of the Debt Collection Act, and that finding an implied abrogation of common law is improper.

Any analysis of statutory construction necessarily begins with the language of the statute. *Bread Pol. Action Committee v. Fed. Elect. Comm.*, 455 U.S. 577, 580, 102 S.Ct. 1235, 1237-38 (1982). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.*, quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980). The language of § 3701(c) of the Debt

Collection Act exempts the agencies of the Federal Government, the States, and units of local government from the provisions of § 3716 (administrative offset) and § 3717 (interest and penalty on claims).

Petitioner argues that merely exempting the States from the provision providing for prejudgment interest does not mean that Congress meant to exempt the States from common law prejudgment interest; in other words, petitioner argues that an express exemption from a statutory provision providing for a remedy is not a clear abrogation from the common law rule providing for the same remedy.

Petitioner relies on *West Virginia v. United States*, 479 U.S. 305, 107 S.Ct. 702 (1987), for the proposition that the issue of statutory construction is not clear. The federal common law rules governing the imposition of prejudgment interest prior to the enactment of the Debt Collection Act were discussed by this Court in *West Virginia*, *supra*, and *Rodgers v. United States*, 332 U.S. 371, 68 S.Ct. 5 (1947). Under federal common law, prejudgment interest was granted or denied by a federal district court by looking to the Congressional purposes behind the obligation, "in the light of general principles deemed relevant by the Court." *Id.* at 373, 68 S.Ct. at 7. In *West Virginia* this Court expressly reserved judgment on whether the Debt Collection Act abrogated the common law regarding prejudgment interest remedies against the States. *Id.* at 312 n. 6, 107 S.Ct. at 707 n.6. The refusal to reach an analysis that would only be dictum in a case brought under a contract that pre-dated the Debt Collection Act does not mandate the conclusion, as petitioner suggests, that the plain meaning of the statute is less than clear.

Federal courts are not common law courts. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313, 101 S.Ct. 1784, 1790 (1981); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822 (1938). The issue of whether a statute has abrogated or pre-empted the common law is a question of whether Congress "spoke directly to a question", and, contrary to the claims of petitioner, not whether "Congress had affirmatively proscribed the use of federal common law." *City of Milwaukee*, at 315, 101 S.Ct. at 1791; *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 101 S.Ct. 1571 (1981). "Federal common law is a 'necessary expedient,'...and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *City of Milwaukee*, at 314, 101 S.Ct. at 1791; *Commonwealth of Penn. Dept. of Public Welfare v. U.S.*, 781 F.2d 334 (3rd Cir. 1986), *reh'g and reh'g en banc denied*.

In interpreting the Death on the High Seas Act,[4] for example, this Court stated that although the Act "does not address every issue of wrongful death law,...but when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 2015 (1978). To supplement the Debt Collection Act with the imposition of a prejudgment interest charge on the basis of common law, when the statute expressly exempts the States from this same interest, makes the statutory exemption meaningless.

There can be little doubt that the Debt Collection Act is a comprehensive effort by Congress to improve the claim collection efforts of the Federal Government. Congress "spoke directly to a question" of prejudgment interest against

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[4] 46 U.S.C.A. §§ 761-67.

the States, and exempted them. Petitioner has provided no evidence or argument suggesting that the express exemption of the States from the provisions of §§ 3716 and 3717 indicates Congressional concern for the encouragement and preservation of "supplemental remedies." *Mobil Oil*, 436 U.S. at 625, 98 S.Ct. at 2015; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 397-98, 90 S.Ct. 1772, 1785 (1970). Instead, petitioner relies on the proposition that permitting the States to be excluded from the imposition of prejudgment interest creates incentives contrary to those intended by Congress under the Debt Collection Act.

The legislative history is silent on the intent of Congress when passing § 3701(c). *West Virginia*, 479 U.S. at 312 n.6, 107 S.Ct. at 707 n.6; *State of Texas*, 951 F.2d at 650. Petitioner argues that exempting prejudgment interest for the States creates a perverse incentive with regard to the overall Congressional purpose of the Debt Collection Act. While it seems clear that the overall purpose of the Act is the improvement of the collection of claims owed to the federal government, the express exemption from §§ 3716 and 3717 for the States contained in § 3701(c) does not create a perverse incentive. First, the legislative history is silent with regard to Congress' perception of and intent to solve claim collection problems with the States;[5] the clear focus of Congress was on private debtors, not the States. E.g., Senate Report No. 97-378, U.S. Code Congressional and Administrative News, 97th Congress, 2nd Session, Vol. 4, p.

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[5] Section 3701(c) also exempts federal agencies and local government units. There is no legislative history indicating any perceived problem in collecting debts from any of these governmental entities.

3379 (1982) ("The $25 billion in delinquencies consists of $13.2 billion in unpaid taxes, $7.7 billion in overdue loans, and the remainder for overdue interest and overpayments to program beneficiaries.") Hence it is not perverse that Congress would exempt the States from two of the harsher collection measures of the Act.

Second, the imposition of strict liability on the States for direct mail delivery losses in the U.S. Postal Service over tolerance levels was the result of the secretary's decision to grant a unilateral action. The waiver of this strict liability is completely discretionary with the Secretary. The statute further provides that the States must resort first to administrative appeals of this discretionary action by the Secretary. There is no effective final judicial review of these discretionary acts by the Secretary. *State of Texas*, 951 F.2d at 648-49. To impose prejudgment interest on the States for the time period spent waiting for a final administrative determination is inequitable; delays in any final decision are just as likely to arise from the adversarial efforts of the USDA as from the States, and delays may also arise independently from within the administrative review process. Congress could well have determined that prejudgment interest was not equitable under these circumstances.

Third, many federal agencies have program offsets available to them to collect a claim against a State. The Debt Collection Act itself evidences such a provision, § 3714, that expressly provides for offsets against the States under certain circumstances.[6] Nonetheless, petitioner argues that

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[6] Congress exempted the States from the general administrative setoff provisions in § 3716. Yet in § 3714 there is an express provision for setoffs against the States in

because some statutes do not provide for setoff authority,[7] this remedy would not be available universally in the absence of the ability to impose prejudgment interest. The important point concerning administrative offsets, however, is that they are an option Congress knows it has available to utilize when it deems appropriate.

Furthermore, the case at bar does not involve a misuse of government funds in violation of statutory purpose. E.g., *Bell v. New Jersey*, 461 U.S. 773, 103 S.Ct. 2187 (1983); *Riles v. Bennett*, 831 F.2d 875 (9th Cir. 1987) (per curiam), *cert. denied*, 485 U.S. 988 (1988). In those latter cases federal monies are indeed mis-allocated, and hence the time value of money is a necessary element of full compensation. *West Virginia*, 479 U.S. at 311, 107 S.Ct. at 706; *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654-55, 103 S.Ct. 2058, 2062-63 (1983). In contrast, the action by the Secretary makes Texas liable for losses due to third party actions that were not adequately curtailed by State and Federal law enforcement. Texas did not spend Federal monies outside program parameters, and hence prejudgment interest is not necessary to make the Federal Government whole. There are no "fruits of the infringement" that need to be "disgorged" from Texas, and no windfalls have been granted. *Devex Corp.*, 461 U.S. at 654-55, 103 S.Ct. at 2062. It is hardly perverse for Congress to intend to avoid subjecting the States to

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the case of State default on stocks or bonds issued by the State and held in trust by the Federal Government.

[7] The Food Stamp Act does provide for administrative offsets. 7 U.S.C.A. §§ 2016(f), 2022(a).

unilateral penalties imposed on the States by the Secretary of Agriculture without judicial review.

It is in fact the petitioner's interpretation that is more circuitous and strained. In essence petitioner argues that the intent of Congress was to establish an elaborate debt collection regimen that includes the imposition of prejudgment interest, but to exempt expressly the States from several of these provisions in order that the States be exposed silently to the same liability of prejudgment interest pursuant to prior common law. Such an interpretation defies the plain meaning of the statute and is an ambiguous and devious *post hoc* imposition of a program liability on the States.

Section § 3717(g)(1) of the Debt Collection Act is further evidence that Congress meant to exercise its authority in determinations of whether prejudgment interest is merited for claims against the States. Section 3717(g)(1) provides that § 3717 does not apply "if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges...." Petitioner is correct that, pursuant to § 3701(c), § 3717(g)(1) does not apply to claims against the States. However, the relevance of § 3717(g)(1) is that this section is yet another indication of the intent of Congress to permit itself to determine those circumstances where the imposition of prejudgment interest would be appropriate.[8] It is another indication that Congress has addressed the issue of prejudgment interest directly, and that it desires to balance the interests and equities involved as it sees fit.

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[8] This is in fact the *post hoc* explanation of § 3701(c) given by the amendment's sponsor, Senator Percy. See *State of Texas*, 951 F.2d at 649-50.

Moreover, Congress has on several occasions expressly imposed prejudgment interest on the States, such as in the Medicaid Act, 42 U.S.C. § 1396b(d)(5), and in the Social Security Act, 42 U.S.C. § 418(j). Subsequent to the decision of the District Court in the case at bar, Congress amended the Food Stamp Act itself, effective November 1990, to expressly provide for prejudgment interest for violations of the quality control provisions of § 2025.[9] The most natural reading of this new provision is that it is a limited and express imposition of a new liability, rather than a redundant codification of common law. In other words, Congress knows how to impose prejudgment interest if it wants to.

The exemption of the States from the prejudgment interest provision in the comprehensive federal claim collection statute is clear. Given that Congress has addressed the issue, it is inappropriate for federal district courts to "supplement" the statute with remedies Congress expressly exempted. Moreover, the exemption is not perverse, and in fact is a quite plausible result of the typical balancing of interests that properly occurs in Congress.

III. BECAUSE THE FOOD STAMP ACT DOES NOT PROVIDE FOR PREJUDGMENT INTEREST ON DISCRETIONARY PENALTIES AWARDED AGAINST A STATE, AND THE DEBT COLLECTION ACT EXPRESSLY EXEMPTS THE STATES FROM PRE-JUDGMENT INTEREST, AWARDING PREJUDGMENT INTEREST AGAINS THE STATE OF TEXAS WOULD VIOLATE THE

[9] 7 U.S.C. § 2022.

PRINCIPLES OF *PENNHURST STATE SCHOOL & HOSPITAL V. HALDERMAN*.

The Fifth Circuit found that imposing prejudgment interest on the States as a result of a violation of the Food Stamp Act was a violation of the principles in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981). *State of Texas*, 951 F.2d at 651. Petitioner maintains nonetheless that this was error, that *Gallegos v. Lyng*, *supra*, was correctly decided, that enactment of the Debt Collection Act did not abrogate the common law remedy of prejudgment interest against States, and that the United States retains, pursuant to *Bell v. New Jersey*, 461 U.S. 773, 103 S.Ct. 2187 (1983), all implied remedies as part of the "backdrop" against which the States contracted for the Food Stamp Program. Petitioner's Brief at p. 13-14.

Respondent does not dispute that as a general rule the Federal Courts have the power to award appropriate relief for the violation of federal statutes, *Franklin v. Gwinnett County Public Schools*, __ U.S. __, 112 S.Ct. 1028, 1035 (1992), and that prior federal common law did provide for prejudgment interest against the States in certain circumstances. *West Virginia*, 479 U.S. at 312, 107 S.Ct. at 707. The applicability of *Gwinnett County* and *West Virginia* to the case *sub judice* is limited because of the punitive, non-contractual nature of the liability, the fact that the violation available in the Food Stamp Act is prejudgment interest noticed, and that the Debt Collection Act abrogated any prior common law exposing the States to prejudgment interest.

The Secretary's unilateral actions denied Texas the ability to "voluntarily and knowingly accept[] the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17, 101 S.Ct. at 1540. *State of Texas*, 951 F.2d at 651; *Perales v. United States*, 598 F.Supp.

19 (S.D.N.Y. 1984), *aff'd*, 751 F.2d 95 (2nd Cir. 1984)(per curiam); *State of Arkansas by Scott v. Block*, 825 F.2d 1254, 1258 n.7 (8th Cir. 1987), *reh'g and reh'g en banc denied*; *Commonwealth of Penn*, 781 F.2d at 342 n.13. Because the Food Stamp Act does not expressly provide for this liability, the Fifth Circuit found that any such additional unbargained-for liability would not conform to the contractual nature of Spending Clause statutes such as the Food Stamp Act. *State of Texas*, 951 F.2d at 651.

The *Gallegos* Court, however, held that the imposition of prejudgment interest was not a new condition or obligation of program participation, but simply a "remed[y] available against a noncomplying State." *Gallegos v. Lyng*, 891 F.2d at 800, quoting *Bell v. New Jersey*, 461 U.S. 773, 103 S.Ct. 2187 (1983). The *Gallegos* Court, relying further on *West Virginia*, *supra*, applied a commercial debt analogy to this unilateral imposition of liability and interest, and determined that prejudgment interest was an "element of compensation" that was "commonly awarded to the nonbreaching party." *Gallegos v. Lyng*, 891 F.2d at 800. The reasoning of the *Gallegos* Court is wrong for several reasons.

First, this Court's holding in *West Virginia* is inapposite to the case at bar because, contrary to the situation in that case, the contract in effect between the State of Texas and the U.S. Department of Agriculture when the liabilities at issue were created was entered into after October 25, 1982, and consequently is subject to the Debt Collection Act. Second, the enactment of the Debt Collection Act abrogated the prior common law remedy of prejudgment interest discussed in *West Virginia*. Third, Congress expressly enumerated the remedies available to the United States in the Debt Collection Act, thereby removing the presumption of all available remedies. *Gwinnett County*, __ U.S. at __, 112

S.Ct. at 1035-36 n.6. Fourth, as discussed in Section I, *supra*, the liability for direct mail delivery losses is punitive in character; punitive damages are not an element of complete compensation, and are not required to make a party whole. The *Gallegos* Court's reliance on *Riles v. Bennett*, *supra*, is misplaced for this very reason; *Riles* is an instance of mis-use of federal program monies, and hence prejudgment interest is a proper element of full compensation.

Moreover, the imposition of implied remedies is limited by *Pennhurst* where the alleged violation is unintentional. *Pennhurst*, 451 U.S. at 28-29, 101 S.Ct. at 1545-46. "The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." *Gwinnett County*, __ U.S. at __, 112 S.Ct. at 1037. The strict liability imposed upon the State of Texas by the Secretary was for the actions of third parties over whom, as employees of the U.S. Postal Service, the State of Texas had no control.

In sum, any unilateral imposition of punitive damages liability and concomitant prejudgment interest without judicial review must conflict with the holding in *Pennhurst* that implied remedies are limited under Spending Power statutes.

IV. THE FIFTH CIRCUIT WAS CORRECT IN ITS DECISION NOT TO DEFER TO THE UNITED STATES DEPARTMENT OF JUSTICE AND THE GENERAL ACCOUNTING OFFICE IN THEIR INTERPRETATION OF § 3701(C) OF THE DEBT COLLECTION ACT.

Petitioner cites to several interpretations of the Debt Collection Act by the General Accounting Office (GAO) and the Department of Justice (DOJ) that support its contention

that the Debt Collection Act permits the imposition of prejudgment interest on the States. Petitioner's brief at pp.11-12. Upon examination the Fifth Circuit found these legal opinions of the GAO and the DOJ to be unpersuasive and lacking precedent. *State of Texas*, 951 F.2d at 651. Petitioner, however, argues that the Court of Appeals was wrong because it failed to accord the proper deference to the statutory interpretation of the agencies charged with applying the Act. Because this principle applies more appropriately to interpretations of policy issues and not of questions of law, the Fifth Circuit was correct in not deferring to the agencies' construction of § 3701(c) and the intent of Congress.

Federal courts are charged with both the authority and the responsibility to correct errors in law made by federal agencies. *SEC v. Chenery Corp.*, 318 U.S. 80, 94, 63 S.Ct. 454, 462 (1943); *Florida Dept. of Labor v. U.S. Dept. of Labor*, 893 F.2d 1319, 1321-22 (11th Cir. 1990). Judicial deference to agency statutory interpretations is, as Petitioner acknowledges, required only where the interpretation is a reasonable one. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2782-83 (1984); Petitioner's Brief at pp. 12-13. Nevertheless, "[i]f the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*, at 842-43, 104 S.Ct. at 2781. Since the Fifth Circuit held that Congress expressly exempted the States from prejudgment interest and did intend to abrogate the common law, the Court of Appeals was not required to adopt an agency interpretation that it found unreasonable. See *Commonwealth of Penn*, 781 F.2d at 342 ("Because the Act's language is clear, we will not defer to the administrators who construe it differently."). The Federal Courts are not required to "allow

misconceptions in law that arise during the agency decision-making process to go unchecked," *Florida Dept. of Labor*, 893 F.2d at 1322, nor remand for further agency determinations where the evidence shows that further agency deliberation would be futile. *Id.*, at 1324.

CONCLUSION

Respondent respectfully requests that this Court deny Petitioner's Writ of Certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

ADDITIONAL STATUTES AND REGULATIONS INVOLVED

1. 7 U.S.C. § 2016(f). State issuance liability.

Notwithstanding any other provision of this chapter, the State agency shall be strictly liable to the Secretary for any financial losses involved in the acceptance, storage and issuance of coupons,..., except that in the case of losses resulting from the issuance and replacement of authorizations for coupons and allotments which are sent through the mail, the State agency shall be liable to the Secretary to the extent prescribed in the regulations promulgated by the Secretary.

2. 7 C.F.R. § 276.1 Responsibilities and Rights.

(a) Responsibilities. (1) State agencies shall be responsible for establishing and maintaining secure control over coupons and cash for which the regulations designate them accountable. Except as otherwise provided in these regulations, any shortages or losses of coupons and cash shall strictly be a State agency liability and the State agency shall pay to FNS, upon demand, the amount of the lost or stolen coupons or cash, regardless of the circumstances.

3. 7 C.F.R. § 276.2 State agency liabilities.

(a) General provisions. Notwithstanding any other provision of this subchapter, State agencies shall be responsible to FNS for any financial losses involved in the

acceptance, storage and issuance of coupons. ....State agencies shall pay to FNS, upon demand, the amount of any such losses.

....

(b)(4) A State agency shall be held strictly liable for mail issuance losses that are in excess of the tolerance level that corresponds to the preselected reporting unit.

....

No. 91-1729

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA

AND

UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

STATE OF TEXAS

AND

TEXAS DEPARTMENT OF HUMAN RESOURCES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1729

UNITED STATES OF AMERICA
AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

STATE OF TEXAS
AND
TEXAS DEPARTMENT OF HUMAN RESOURCES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Respondents do not dispute the existence of a square conflict among the six courts of appeals that have decided the precise question presented in this case. Instead, they assert that the decision of the Fifth Circuit below was correct, and that this Court should therefore deny certiorari despite the acknowledged and widening circuit conflict over a concededly important question involving substantial sums of money and potentially affecting a wide array of federal-state cooperative grant programs. Even if respondents were correct in their contention that pre-

judgment interest is not due in the circumstances of this case, review would be warranted to resolve the conflict, because the present state of the law leaves the federal government free to collect prejudgment interest from some States but not from others.[1] For the reasons set forth below, moreover, respondents' attempt to defend the Fifth Circuit's decision is unpersuasive.

1. Respondents contend that their obligation to reimburse the United States for mail issuance losses is not a contractual debt at all, but is instead a "penalty" imposed unilaterally and arbitrarily by the Secretary of Agriculture. Br. in Opp. 4-5. As a result, respondents assert, no interest is due in this case, because "penalties" are not subject to prejudgment interest. *Id.* at 5 (citing *Rodgers* v. *United States*, 332 U.S. 371, 374-376 (1947)). That contention is incorrect.

a. The State of Texas voluntarily chose to participate in the Food Stamp Program,[2] and by doing so it

[1] For that reason, respondents err in suggesting (Br. in Opp. 5) that the Court need not grant review in this case because the threshold issue of the proper classification of their debt may prevent the Court from resolving the question whether the Debt Collection Act of 1982 abrogated the federal government's common-law right to prejudgment interest. The circuits are divided over the ability of the United States to collect prejudgment interest from the States in precisely the circumstances of this case, so the Court's resolution of this case, even on the ground urged by respondents, would necessarily resolve that conflict.

[2] State participation in the Food Stamp Program is not mandatory, but is encouraged by the generous federal benefits provided under the program. In general, the federal government pays for the entire cost of the food stamps provided to program beneficiaries and, in addition, substantially underwrites the expenses incurred by the States in administering the program. See 7 U.S.C. 2025.

contractually bound itself to comply with the federal regulations governing the program. Pet. 3-4; Br. in Opp. 1. States participating in the program, including Texas, are required to sign a "Federal/State Agreement," which is "the legal agreement between the State and the Department of Agriculture" and "is the means by which the State elects to operate the Food Samp Program." 7 C.F.R. 272.2(a)(2). Pursuant to the express terms of the Federal/State Agreement, each State and the Department of Agriculture contractually agree "to act in accordance with the provisions of the Food Stamp Act of 1977, as amended, [and its] implementing regulations * * *. The State and [the Department] further agree to fully comply with any changes in Federal law and regulations." 7 C.F.R. 272.2(b)(1). Thus, the federal Food Stamp Program regulations, and all amendments thereto, are expressly incorporated as terms of the contract between the federal government and each State that participates in the program.

The mail loss tolerance regulations applied in this case were adopted on an interim basis on November 9, 1982 (see 47 Fed. Reg. 50,681), and in final form on April 8, 1983 (see 48 Fed. Reg. 15,223). The mail issuance losses at issue here did not occur until 1986. Pet. 4. Thus, at the time those mail issuance losses were incurred, the contract between respondents and the United States expressly provided that respondents would reimburse the United States for all such losses in excess of the regulatory tolerance level.[3] Respondents' attempt to deny the contractual nature of their debt is without foundation.

[3] Contrary to respondents' assertion (Br. in Opp. 4), there was nothing "arbitrary" about the tolerance level selected by

b. Nor are respondents correct in asserting that their liability for excessive mail losses constitutes a "penalty" that is exempt from prejudgment interest under *Rodgers* v. *United States*, 332 U.S. 371 (1947). In *Rodgers*, the federal government imposed civil penalties on a farmer who marketed cotton in excess of his statutory quota, and sought to collect prejudgment interest on the penalty amount. The Court held that those penalties were more analogous to criminal fines—which do not accrue prejudgment interest—than to more traditional financial obligations, and accordingly declined "to add [prejudgment] interest to th[e] very substantial penalties already imposed upon non-cooperating farmers." 332 U.S. at 376.

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the Secretary of Agriculture. This regulatory limit was adopted only after an exhaustive and meticulous examination of the matter in public rulemaking proceedings conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 553. The tolerance level was based upon an examination of historical mail loss data which suggested that a mail loss limit of 0.5% would be a "realistically attainable goal." 47 Fed. Reg. 50,682 (1982). Challenges to the validity of the mail loss tolerance level have been unanimously rejected by the courts. See *Arkansas* v. *Block*, 825 F.2d 1254, 1256-1257 (8th Cir. 1987); *Gallegos* v. *Lyng*, 891 F.2d 788, 792 (10th Cir. 1989).

Moreover, respondents are estopped from asserting that the mail loss tolerance level was "arbitrary." Respondents were entitled to seek judicial review of the Secretary's mail loss regulation, and indeed they initially challenged the tolerance level on the ground that it was not "based on any empirical evidence." C.A. Record 8. Thereafter, however, respondents expressly disclaimed any challenge to the validity of the regulations. Pet. App. 16a. Having deliberately abandoned their contention that the mail loss tolerance level was set arbitrarily by the Secretary, respondents should not be permitted to resurrect that contention here.

This case, by contrast, involves the recoupment pursuant to contract of actual financial losses suffered by the federal government, not the imposition of civil fines or penalties for the sole purpose of punishing prohibited conduct. The mail loss tolerance regulations do not impose penalties. Rather, they simply allocate to the States certain financial losses that result from the operation of the Food Stamp Program—losses that would otherwise be borne exclusively by the federal government, which is obligated to replace lost food stamp coupons. See 7 U.S.C. 2013, 2016; Pet. 3 n.2. Since respondents' debt is a contractual obligation rather than a civil fine, imposition of prejudgment interest is appropriate. *West Virginia* v. *United States*, 479 U.S. 305, 310 (1987) ("[P]arties owing debts to the Federal Government must pay prejudgment interest *where the underlying claim is a contractual obligation to pay money.*") (emphasis added).[4]

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[4] Respondents also err in contending (Br. in Opp. 11) that imposition of interest on their debt pending administrative appeal and judicial review would be "inequitable." Prejudgment interest serves to maintain the real value of the debt so that neither party to the dispute benefits from a delay in payment. Imposition of prejudgment interest is in keeping with the "dictate[s] of natural justice, and the law of every civilized country," *Curtis* v. *Innerarity*, 47 U.S. (6 How.) 146, 154 (1848), and with "the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained." *Rodgers* v. *United States*, 332 U.S. at 373. Indeed, the *failure* to impose prejudgment interest would result in inequity under the circumstances of this case, because it would reward respondents for their unjustified delay in payment while effectively penalizing the taxpayers of those States that promptly paid their Food Stamp Program debts. Thus, imposition of prejudgment in-

2. Respondents assert (Br. in Op. 6-14) that the Debt Collection Act of 1982 abrogated the federal government's preexisting common-law right to collect prejudgment interest on debts owed by state and local governments. As respondents concede, however, only where Congress has "spoke[n] directly to a question" will congressional enactments be deemed to have supplanted the common law. Br. in Opp. 9 (quoting *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 315 (1981)). Thus, recourse to federal common law is inappropriate where a federal statute or regulatory scheme establishes a legal standard that provides an answer to the precise question at issue. See *City of Milwaukee*, 451 U.S. at 317-326; *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 623-626 (1978). But where Congress has declined to legislate with respect to a particular question, reference to federal common law is appropriate to "fil[l] a gap left by Congress' silence." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. at 625; see also *City of Milwaukee*, 451 U.S. at 323, 324-325 n.18.

The Debt Collection Act does not speak directly to the question of the federal government's right to prejudgment interest on debts owed by state and local governments; instead, it merely exempts those entities from the Act's provisions for prejudgment interest and says nothing whatsoever about the propriety of collecting such interest under the common law. Accordingly, recourse to federal common law is required to "fil[l] [the] gap left by Congress' silence." *Mobil Oil Corp.*, 436 U.S. at 625.

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terest on respondents' debt is clearly called for, because "fully repaying the Federal Government * * * will [f]ther the distribution of the burdens * * * that Congress intended." *West Virginia* v. *United States*, 479 U.S. at 310-311.

Respondents nonetheless suggest that Congress could not have intended to exempt the States from the Act's "elaborate debt collection regimen that includes the imposition of prejudgment interest" only to expose the States "silently to the same liability of prejudgment interest pursuant to prior common law." Br. in Opp. 13. What respondents ignore, however, is the fact that the States' liability for prejudgment interest at common law is not coterminous with the provisions of the Act. The Act establishes a mandatory prejudgment interest rate applicable to all debts owed the United States, and in addition requires imposition of processing charges and penalties on delinquent claims. 31 U.S.C. 3717(a) and (e). The common law, by contrast, is far more flexible, permitting the courts to look to "the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed" and the other "general principles deemed relevant by the Court" in determining whether to impose prejudgment interest. *Rodgers* v. *United States*, 332 U.S. at 373. Moreover, there is no common-law requirement that the States pay processing charges or penalties in addition to prejudgment interest. Congress could well have decided, in the interests of federalism and comity, to leave state and local governments subject to the more flexible, and less onerous, regime of the common law rather than subjecting them to the strict and mandatory requirements of the Debt Collection Act. See *Gallegos* v. *Lyng*, 891 F.2d 788, 798 (10th Cir. 1989).[5]

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[5] For essentially the same reason, respondents draw no support from their observation that Congress knows how to impose prejudgment interest on the States when it wishes to do so. Br. in Opp. 14. Respondents invoke the Medicaid Act, 42 U.S.C. 1396b(d)(5), and the Social Security Act, 42 U.S.C. 418(j) (1982), but those provisions merely codified particular

3. For the reasons stated in the petition (Pet. 13-14), respondents' reliance (Br. in Opp. 15-17) on *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981), is misplaced. The federal government's consistent position that prejudgment interest may be imposed on debts owed by state and local governments was a matter of public record long before respondents incurred the debts at issue in this case,[6] as was the obligation of States to reimburse the federal government for mail issuance losses in excess of the regulatory tolerance level. See Pet. 12 (citing 49 Fed. Reg. 8894 (1984)); 48 Fed. Reg. 15,223 (1983). Had respondents wished to avoid the imposition of prejudgment interest on obligations incurred pursuant to the mail loss regulations, they could have done so by withdrawing from the Food Stamp Program prior to incurring those obligations. By failing to do so, respondents "voluntarily and knowingly accept[ed] the terms of the 'contract,'" *Pennhurst*, 451 U.S. at 17, and subjected themselves to the normal remedies available to the federal government when it seeks to enforce its contractual rights. See *Bell* v. *New Jersey*, 461 U.S. 773, 790 n.17 (1983). Having chosen to accept the substantial financial benefits provided by the federal government to the States pursuant to the Food Stamp Program, respondents cannot now be permitted to evade the federal government's efforts to enforce its contractual rights and remedies under that program.

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interest-computation arrangements to be applied in certain limited circumstances. They are not evidence of any legislative intention that, in their absence, there would be *no* interest available.

[6] Thus, respondents are clearly wrong to characterize the Department of Agriculture's application of this longstanding interpretation as "an ambiguous and devious *post hoc* imposition of a program liability on the States." Br. in Opp. 13.

4. The administrative agencies charged with implementing the Debt Collection Act have consistently taken the position that the Act does not abrogate the federal government's common-law right to collect prejudgment interest on debts owed by the States. Pet. 11-13. Respondents assert that judicial deference is not due to the contemporaneous agency interpretations of the Debt Collection Act because such deference "applies more appropriately to interpretations of policy issues and not of questions of law." Br. in Opp. 18. As this Court's cases make clear, however, deference is due to reasonable agency interpretations of statutes they are charged to administer, even where those interpretations involve "questions of law" rather than "policy issues." See, *e.g.*, *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401-1402 (1992) (deferring to agency interpretation of statutory phrase). Because the administrative interpretation of the Act does not conflict with the Act's plain language, judicial deference is required. *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

JULY 1992

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No. 91-1729

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

STATE OF TEXAS AND
TEXAS DEPARTMENT OF HUMAN RESOURCES

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: APRIL 27, 1992
CERTIORARI GRANTED: OCTOBER 5, 1992

TABLE OF CONTENTS

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

A. United States District Court for the Western District of Texas
Case No. 88-CV-820

STATE OF TEXAS, ET AL.

v.

UNITED STATES, ET AL.

No. 88-CV-820 (W.D. Tex.)

DATE		PROCEEDINGS
10/7/88	1	Complaint filed and 2 summons(es) issued (mm) [Entry date 10/14/88]
		* * * *
5/30/89	10	Order that the instant action is consolidated with A-87-CA-774 . . . and that A-88-CA-820 is hereby transferred to the Docket of the Honorable James R. Nowlin, and set scheduling order deadlines * * *
		* * * *
11/13/90	—	Order granting defendants' motion for summary judgment and further ORDERED that the State of Texas pay prjudgment [sic] interest on the amount owed to the federal government in this cause. (mcl) [Entry date 11/15/90]

DATE		PROCEEDINGS
11/13/90	—	Judgment for The United States against State of Texas. Further, that the State of Texas pay prejudgment interest on the amount owed to the federal government under the Food Stamp Program for mail lossess [sic] above the tolerance level of 0.5% (mcl) [Entry date 11/15/90]

* * * *

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

B. United States District Court for the Western District of Texas
Case No. 87-CV-774

STATE OF TEXAS, ET AL.

v.

UNITED STATES, ET AL.

No. 87-CV-774 (W.D. Tex.)

DATE		PROCEEDINGS
11/16/87	1	Complaint filed and summonses issued. (mn) [Entry date 11/23/87]
		* * * *
05/30/89	18	Order that the instant action (A-88-CA-820) is consolidated with A-87-CA-774 and that the scheduling deadlines applicable to A-87-CA-774 are adopted to apply to the consolidated action. (mz)
		* * * *
11/8/89	22	Motion by USA for summary judgment (pm) [Entry date 11/09/89]
		* * * *
11/13/90	49	Order granting motion for summary judgment, and further ORDERED that the State of Texas pay prejudgment interest on the amount owed to the federal government in this cause. [22-1] (mcl) [Entry date 11/15/90]

DATE		PROCEEDINGS
11/13/90	50	Judgment for USA against State of Texas. "ACCORDINGLY, IT IS ORDERED that the defendant's motion for summary judgment is hereby granted; and further ORDERED that the State of Texas pay prejudgment interest on the amount owed to the federal government under the Food Stamp Program for mail losses above the tolerance level of 0.5%. (mcl) [Entry date 11/15/90]
		* * * *
1/8/91	51	Notice of appeal by Marlin W. Johnson, T.D.H.S., State of Texas (mcl) [Entry date 01/09/91]
		* * * *

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

C. United States Court of Appeals
for the Fifth Circuit
Case No. 91-8042

STATE OF TEXAS, ET AL.,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES, ET AL.,
DEFENDANTS-APPELLEES

DATE	PROCEEDINGS
1/18/81	Record on Appeal
	* * * *
10/7/91	Case Argued * * *
	* * * *
01/28/92	Opinion Rendered
	* * * *
01/28/92	Flg. & Entg. Judgment
	* * * *
2/27/92	Jdgt. as Mdt. Issd. to Clerk
	* * * *

[SEAL]

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE
SOUTHWEST REGION
1100 Commerce Street
Dallas, TX 75242

CERTIFIED MAIL—
RETURN RECEIPT REQUESTED

Feb. 25, 1987

Mr. Marlin Johnston, Commissioner
Texas Department of Human Services *FIRST DEMAND*
P.O. Box 2960—520 W.
Austin, Texas 78769

Dear Mr. Johnston:

Subject: Family Nutrition Programs—First Demand for Payment of Third and Fourth Quarter (April-September 1986) Fiscal Year 1986 Liabilities for Mail Issuance Tolerance Levels.

Based on tolerance levels specified in 7 CFR 274.3(c)(4) of the Food Stamp Program regulations dated April 8, 1983, a claim of $150,350 is established against the Texas Department of Human Services. This liability is computed as follows:

Third Quarter (April-June 1986)		Fourth Quarter (July-September 1986)	
Cameron County	$ 4,805	Atascosa County	$ 757
Dallas County	2,219	Brazos County	147
Gregg County	3,489	Caldwell County	1,058
Harris County	5,707	Calhoun County	1,072
Hidalgo County	1,844	Comal County	35
Howard County	200	Crosby County	2,071
Jefferson County	482	Dallas County	19,452
Midland County	175	Dawson County	520
Navarro County	1,749	Denton County	1,274
Starr County	13,512	Dimmit County	4,797
	$34,182	El Paso County	4,618

Floyd County	2,104
Galveston County	2,086
Gregg County	11,658
Guadalupe County	756
Hale County	7,416
Hardin County	1,714
Harris County	11,227
Hays County	2,392
Hidalgo County	3,387
Hockley County	2,607
Howard County	39
Jackson County	519
Jasper County	361
Jefferson County	664
Johnson County	754
Kaufman County	652
Lamb County	53
Lubbock County	3,894
Maverick County	3,601
Medina County	830
Midland County	3,214
Newton County	970
Nueces County	1,986
Orange County	1,289
Parker County	483
Parmer County	2,116
Reeves County	2,090
San Patricio County	68
Shelby County	266
Tarrant County	1,895
Terry County	1,547
Victoria County	3,039
Washington County	1,886
Zavala County	2,804
	$116,168

Payment is due March 27, 1987. Based on TFRM 6-8000, Section 8020, Title 4 CFR 102.11, interest will be charged at 7.625 percent per annum starting March 28, 1987, on any amount of this claim for which payment has not been received by that date.

This claim may be satisfied by cash payment or letter of credit offset. Any questions concerning the procedure for repayment should be directed to me at (214) 767-0232.

In accordance with 7 CFR 276.1(b) of the Food Stamp Program regulations, your agency has the right to appeal any claim brought against you by the Food and Nutrition Service. If you choose to contest the claim, in accordance with 7 CFR 276.7(c) of the Food Stamp Program regulations, you must file an appeal with the Executive Secretary, State Food Stamp Appeals Board, within ten days of the date you receive this letter.

Interest at the established rate of 7.625 percent per annum will accrue during the appeal process on any amount of this claim that is sustained by the appeals Review Board. The address of the Appeals Review Board is:

U.S. Department of Agriculture
Appeals Review Board
3101 Park Center Drive, Suite 304
Alexandria, Virginia 22302

If you plan to appeal, please forward a copy of your notice of intent to appeal within ten days of the date you receive this letter to Regional Director, Family Nutrition Programs, Food and Nutrition Service, United States Department of Agriculture, 1100 Commerce Street, Room 5-C-30, Dallas, Texas 75242.

Sincerely,

/s/ Ronald J. Rhodes
RONALD J. RHODES
Regional Director
Family Nutrition Programs

Enclosure

[SEAL]

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE
SOUTHWEST REGION
1100 Commerce Street
Dallas, TX 75242

May 27, 1987

CERTIFIED MAIL—
RETURN RECEIPT REQUESTED

FIRST DEMAND

Mr. Marlin Johnston, Commissioner
Texas Department of Human Services
P.O. Box 2960—520 W.
Austin, Texas 78769

Dear Mr. Johnston:

Subject: Family Nutrition Programs—First Demand for Payment of First and Second Quarter (October 1986-March 1987) Fiscal Year 1987 Liabilities for Mail Issuance Tolerance Levels.

Based on tolerance levels specified in 7 CFR 274.3(c)(4) of the Food Stamp Program regulations dated April 8, 1983, a claim of $262.035 is established against the Texas Department of Human Services. This liability is computed as follows:

First Quarter (October-December 1986)		Second Quarter (January-March 1987)	
Bee	$ 789	Brazos	$ 239
Brazos	2,570	Brewster	452
Cameron	6,298	Collin	1,994
Collin	1,521	Dallas	23,765
Comal	490	Dawson	698
Dallas	7,894	Denton	584
Denton	1,243	Ellis	1,546
Ector	3,018	El Paso	26,323
Ellis	2,674	Freestone	52
El Paso	9,934	Galveston	882
Galveston	1,276	Gregg	23,368
Gregg	37,887	Hale	1,605

Grimes	1,212	Harris	10,802
Guadalupe	700	Hays	1,433
Hale	202	Hidalgo	2,003
Harris	14,838	Hill	2,060
Hays	805	Hockley	137
Hidalgo	9,784	Jefferson	788
Howard	1,314	Midland	8,610
Hunt	694	Milam	1,192
Johnson	1,363	Potter	178
Lamb	457	Shelby	283
Liberty	2,358	Tarrant	1,329
Limestone	916	Terry	854
Lubbock	2,144	Travis	1,897
Medina	2,272	Walker	527
Midland	5,745		
Navarro	2,507		
Nueces	7,132		
Red River	189		
Reeves	581		
Starr	5,477		
Tarrant	4,832		
Terry	1,891		
Travis	251		
Victoria	1,510		
Washington	3,666		

Payment is due June 26, 1987. Based on TFRM 6-8000, Section 8020, Title 4 CFR 102.11, interest will be charged at 7.625 percent per annum starting June 27, 1987 on any amount of this claim for which payment has not been received by that date.

This claim may be satisfied by cash payment or letter of credit offset. Any questions concerning the procedure for repayment should be directed to me at (214) 767-0232.

In accordance with 7 CFR 276.1(b) of the Food Stamp Program regulations, your agency has the right to appeal any claim brought against you by the Food and Nutrition Service. If you choose to contest the claim, in accordance with 7 CFR 276.7(c) of the Food Stamp Program regulations, you must file an appeal with the Executive Secretary, State Food Stamp Appeals Board, within ten days of the date you receive this letter.

Interest at the established rate of 7.625 percent per annum will accrue during the appeal process on any amount of this claim that is sustained by the Appeals Review Board. The address of the Appeals Review Board is:

U.S. Department of Agriculture
Appeals Review Board
3101 Park Center Drive, Suite 304
Alexandria, Virginia 22302

If you plan to appeal, please forward a copy of your notice of intent to appeal within ten days of the date you receive this letter to Regional Director, Family Nutrition Programs, Food and Nutrition Service, United States Department of Agriculture, 1100 Commerce Street, Room 5-C-30, Dallas, Texas 75242.

Sincerely,

/s/ Ronald J. Rhodes
RONALD J. RHODES
Regional Director
Family Nutrition Programs

Enclosure

[SEAL]

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
Washington, D.C. 20250

Oct. 13, 1987

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

Mr. Marlin W. Johnston
Commissioner
Texas Dept. of Human Services
John H. Winters Human Services Ctr.
701 West 51st St.
P.O. Box 2960
Austin, Texas 78769

Re: State Food Stamp Appeals Board
Administrative Review No. 17-87

Dear Mr. Johnston:

This Administrative Review concerns a determination by the Food and Nutrition Service, U.S. Department of Agriculture, that the State of Texas is liable to this Department for $150,350 for the third and fourth quarters of Fiscal Year 1986. The liability is based on the State exceeding allowable tolerance levels for mail issuance losses as provided in 7CFR 274.3(c)(4).

The record on this matter consists of the State of Texas' appeal dated March 11, 1987, supplemental material submitted by the State, file documents from the Food and Nutrition Service and the record of the hearing held July 13, 1987.

In its appeal the State of Texas disputes the underlying assumptions on which tolerance levels have been established for mail issuance losses. Further, the State maintains that if there is any loss it has not been allocated properly. The State also contends that it should not be held liable for mail issuance losses resulting from theft by U.S. Postal Service employees.

After a thorough review of all the material presented and the hearing record, it is the opinion of the Board that the State of Texas is liable to the Food and Nutrition Service for $150,350. The regulatory provisions found in 7CFR 274.3(c)(4) are clear. The Food and Nutrition Service acted in accordance with its authority when it billed the State for exceeding the tolerance levels specified.

It seems readily apparent to the Board that the regulations in effect during the time period covered by this appeal are sufficient and clear in stipulating the requirements for issuance of food coupons, the methods for determining losses and the penalties for exceeding loss tolerance. The fact that tolerances are set suggests a willingness on the part of the Food and Nutrition Service to waive, in advance, some program losses regardless of who is responsible.

The Board recognizes and commends the State for its efforts to cooperate with the U.S. Postal Service in addressing and minimizing the mail issuance losses resulting from thefts attributable to Postal Service employees. However, the Board believes these efforts were no greater than are to be expected of a State when carrying out the regulatory provisions for mail issuance of food stamps. As provided in 7CFR 274.2 options other than mail issuance were available to the State, if the State determined its mail issuance performance to be unsatisfactory.

The determination of the Board is final and not subject to reconsideration. It shall take effect 30 days after delivery to the State of Texas. Should the State of Texas be aggrieved by this final determination, it may seek judicial review and trial *de novo* by filing a complaint against the United States in a court of competent jurisdiction within 30 days after delivery of this letter.

Sincerely,

/s/ Orval Kerchner
ORVAL KERCHNER,
Chairman
State Food Stamp Appeals Board

[SEAL]

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
Washington, D.C. 20250

Sep. 12, 1988

CERTIFIED MAIL—Return Receipt Requested

Mr. Marlin W. Johnston
Texas Dept. of Human Services
John H. Winters Human Services Center
701 West 51st Street
P.O. Box 2960
Austin, Texas 78769

Re: State Food Stamp Appeals Board
Administrative Review No. 23-87

Dear Mr. Johnston:

This Administrative Review concerns a determination by the Food and Nutrition Service, U.S. Department of Agriculture, that the State of Texas is liable to this Department for $262,035 for the period October 1986 through March 1987. The liability is based on the State exceeding allowable tolerance levels for mail issuance losses as provided in 7 C.F.R. 274.3(c)(4).

The record on this matter consists of the State of Texas' appeal dated June 2, 1987, supplemental material submitted by the State, file documents from the Food and Nutrition Service and the record of the hearing held January 7, 1988.

In its appeal the State of Texas disputes the underlying assumptions on which tolerance levels have been established for mail issuance losses. Further, the State maintains that if there is any loss it has not been allocated properly. The State also contends that it should not be held liable for mail issuance losses resulting from theft by U.S. Postal Service employees.

After a thorough review of all the material presented and the hearing record, it is the opinion of this Board that the State of Texas is liable to the Food and Nutrition Service for $262,035. The regulatory provisions found in 7 C.F.R. 274.3(c)(4) are clear. The Food and Nutrition Service acted in accordance with its authority when it billed the State for exceeding the tolerance levels specified.

It seems readily apparent to the Board that the regulations in effect during the time period covered by this appeal are sufficient and clear in stipulating the requirements for issuance of food coupons, the methods for determining losses and the penalties for exceeding loss tolerance. The fact that tolerances are set suggests a willingness on the part of the Food and Nutrition Service to waive, in advance, some program losses regardless of who is responsible.

The Board's reading of the mail issuance regulations leaves the clear understanding that the States are to share a portion of mail issuance losses, without respect to the cause of the loss. Therefore, a waiver of the State of Texas' liability and requiring the FNS to bear the entire amount of the mail issuance loss would be contrary to the intent and purpose of the regulations.

The Board recognizes and commends the State for its efforts to cooperate with the U.S. Postal Service in addressing and minimizing the mail issuance losses resulting from thefts attributable to Postal Service employees. However, the Board believes these efforts were no greater than are to be expected of a State when carrying out the regulatory provisions for mail issuance of food stamps. As provided in 7 C.F.R. 274.2 options other than mail issuance were available to the State, if the State determined its mail issuance performance to be unsatisfactory.

The determination of the Board is final and not subject to reconsideration. It shall take effect 30 days after delivery

to the State of Texas. Should the State of Texas be aggrieved by this final determination, it may seek judicial review and trial *de novo* by filing a complaint against the United States in a court of competent jurisdiction within 30 days after delivery of this letter.

Sincerely,

/s/ Orval Kerchner
ORVAL KERCHNER
Chairman
State Food Stamp Appeals Board

SUPREME COURT OF THE UNITED STATES

No. 91-1729

UNITED STATES, ET AL., PETITIONERS

v.

TEXAS, ET AL.

ORDER ALLOWING CERTIORARI

Filed October 5, 1992

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

October 5, 1992

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No. 91-1729

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA
AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

STATE OF TEXAS
AND
TEXAS DEPARTMENT OF HUMAN RESOURCES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the United States retains its common-law right to collect prejudgment interest on debts owed by the States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

Statutes and regulations—Continued: Page

Regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 951 F.2d 645. The opinion of the district court (Pet. App. 15a-29a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1992. The petition for a writ of cer-

tiorari was filed on April 27, 1992, and was granted on October 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Debt Collection Act of 1982, 31 U.S.C. 3701(c), 3717, the regulations promulgated thereunder, 4 C.F.R. 102.13(i), the Food Stamp Act, 7 U.S.C. 2016(f), and the regulations promulgated thereunder, 7 C.F.R. 272.2, 274.3 (1986), are reproduced at App., *infra*, 1a-7a.

STATEMENT

1. Congress adopted the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749,[1] to enhance and render more efficient the federal government's efforts to collect debts. See 96 Stat. 1749, Preamble. The Act requires federal agencies to assess interest on debts owed them, 31 U.S.C. 3717(a)(1), and to impose "a penalty charge of not more than 6 percent" on debts not paid within 90 days. 31 U.S.C. 3717(e)(2). Each federal agency must also assess "a charge to cover the cost of processing and handling a delinquent claim." 31 U.S.C. 3717(e)(1).

Section 3717, the provision of the Act governing imposition of interest, applies only to debts owed the United States by any "person." 31 U.S.C. 3717(a)(1). The Act provides that, for purposes of Section 3717, the term "person" does not include "an

[1] Pursuant to Pub. L. No. 97-452, 96 Stat. 2467, 2469-2474 (1983), portions of the Act were recodified at 31 U.S.C. 3701, 3716-3719. As part of that recodification, various non-substantive changes were made.

agency of the United States Government, of a State Government, or of a unit of general local government." 31 U.S.C. 3701(c).

2. The debts involved in this litigation arise from Texas's participation in the Food Stamp Program. Under that program, the Food and Nutrition Service (FNS) of the United States Department of Agriculture provides food stamp coupons to participating States for distribution to qualified individuals and households based on need. 7 U.S.C. 2013(a), 2014. The cost of the food stamps is borne entirely by the United States; the cost incurred by each participating State in the administration of the program is divided equally between the State and the federal government in most cases. 7 U.S.C. 2025(a).

Food stamp coupons are negotiable obligations of the United States, redeemable at face value for approved food products. 7 U.S.C. 2013, 2016. Thus, they can easily be used by persons other than their intended recipients. When coupons are lost or stolen before reaching their intended recipients, the intended recipients are entitled to receive replacement coupons. 7 C.F.R. 274.6. If the lost or stolen coupons are then redeemed illegally by a third party, the federal government ends up paying twice as much as it should: once for the replacement coupons redeemed by the intended recipients, and again for the illegally redeemed coupons.

The Food Stamp Program regulations allow participating States to distribute food stamp coupons by mail. 7 C.F.R. 274.3(a). States that elect to utilize that distribution method are, however, obligated to reimburse the federal government for a portion of the cost of replacing coupons that are lost or stolen

in the mail. 7 U.S.C. 2016(f). States must make reimbursement for all such mail issuance losses in excess of a "tolerance level" established by regulation. 7 C.F.R. 274.3.

3. At all times pertinent here, the State of Texas was a voluntary participant in the Food Stamp Program, and as such had contractually bound itself to comply with the federal regulations governing that program. See 7 C.F.R. 272.2(a)(2) and (b)(1) (1986) (setting forth the "Federal/State Agreement" under which the Food Stamp Program is operated by each participating State). As authorized by 7 C.F.R. 274.3(a) (1986), Texas chose to utilize the mails for a large proportion of its food stamp deliveries. Unfortunately, the State suffered substantial losses of mailed food stamp coupons, in part as a result of theft by United States Postal Service employees. Pet. App. 2a. Those losses exceeded the loss tolerance limits that had been established by the applicable federal regulations.[2]

The State's excess mail issuance losses (i.e., the losses in excess of the regulatory tolerance limits) amounted to $150,350 for the period from April 1986 through September 1986, and $262,035 for the period from October 1986 through March 1987.[3] The

[2] The regulatory loss tolerance limit applicable to the losses at issue in this case was set at 0.5% of each reporting area's total mail issuances for each calendar quarter. 7 C.F.R. 274.3 (c)(1)(i) (1986). That regulatory limit was based upon an examination of historical mail loss data which suggested that a mail loss limit of 0.5% would be a "realistically attainable goal." 47 Fed. Reg. 50,682 (1982).

[3] In the aggregate, the State suffered mail issuance losses of over $1.1 million between April 1986 and March 1987. Under the applicable regulations, the federal government assumed liability for all mail issuance losses below the regulatory tolerance limit. 7 C.F.R. 274.3(c)(4)(i) (1986). Thus, the federal government replaced all $1.1 million worth of food stamp coupons lost through the State's mail issuance program between April 1986 and March 1987, but sought reimbursement from the State for only $412,385. J.A. 6, 9.

FNS notified the State of its liability for those losses, and further advised the State that interest would begin to accrue on the balance outstanding unless payment was made within 30 days. Pet. App. 3a; J.A. 7-8, 10-11.

The State sought administrative relief, asking the FNS's State Food Stamp Appeals Board to grant waivers of the State's liability for the mail issuance losses. After conducting administrative hearings, the Appeals Board denied relief. Pet. App. 3a; J.A. 12-14, 15-17.

4. The State brought suit against petitioners in the United States District Court for the Western District of Texas, seeking judicial review of the Appeals Board's refusal to grant waivers of its liability for the mail issuance losses. The State contended that its excess mail losses should have been waived because a portion of those losses was caused by Postal Service employee theft. The State further claimed that the Debt Collection Act of 1982 precluded the imposition of interest on any amounts owed the federal government by the State.

The district court granted summary judgment in favor of petitioners on both issues. Pet. App. 30a-31a. The court held that the decision whether to grant a waiver of the State's liability was unreviewable because it was committed to agency discretion by law, citing *Heckler* v. *Chaney*, 470 U.S. 821 (1985), and *Webster* v. *Doe*, 486 U.S. 592 (1988). Pet. App.

19a-22a. The court ruled in the alternative that the denial of the State's requests for waivers was not arbitrary or capricious. *Id.* at 25a-26a.

The district court also concluded that the United States was entitled to receive prejudgment interest on the amounts owed by the State. The court acknowledged the existence of a circuit conflict on that issue, but adopted the views of the Tenth Circuit in *Gallegos* v. *Lyng*, 891 F.2d 788 (10th Cir. 1989), which held that the federal government's common-law right to prejudgment interest from the States survived the enactment of the Debt Collection Act. Pet. App. 26a-29a. The district court also rejected the State's contention that, under *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981), imposition of prejudgment interest on the State was impermissible because the Food Stamp Act did not itself authorize such interest. The court explained that *Pennhurst* does not apply to the use of existing remedies against a State that fails to satisfy its duties under a federal program. Pet. App. 27a-28a (citing *Bell* v. *New Jersey*, 461 U.S. 773 (1983)).

5. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-14a. The court agreed that the Appeals Board's decision not to waive the State's liability for excessive food stamp mail issuance losses was not judicially reviewable, and thus rejected the State's challenge to the district court's ruling on that issue. Pet. App. 5a-7a. The court reversed, however, that portion of the district court's judgment requiring the State to pay prejudgment interest. *Id.* at 7a-13a.

The court of appeals began its analysis by noting the existence of a circuit conflict on the prejudgment interest issue. Pet. App. 7a (citing *Perales* v. *United*

States, 751 F.2d 95 (2d Cir. 1984) (per curiam), aff'g 598 F. Supp. 19 (S.D.N.Y. 1984) (rejecting federal government's claim to prejudgment interest); *Pennsylvania Dep't of Public Welfare* v. *United States*, 781 F.2d 334 (3d Cir. 1986) (same); *Arkansas* v. *Block*, 825 F.2d 1254 (8th Cir. 1987) (same); and *Gallegos* v. *Lyng*, 891 F.2d 788 (10th Cir. 1989) (allowing federal government's claim for prejudgment interest)). Aligning itself with the Second, Third, and Eighth Circuits, the court held that "the Debt Collection Act of 1982 abrogated the federal common-law right to assess interest on outstanding debts of the states incurred under the mail issuance loss provision of the Food Stamp Act." Pet. App. 13a.

The court stated that there was "no discernible legislative history to guide us with this question," and that the purpose of the Debt Collection Act was "to tighten the collection process and create incentives for the timely payment of debts to the United States." Pet. App. 10a, 11a. The court rejected, however, the argument that abrogation of the United States' common-law right to prejudgment interest would create incentives for States to delay payment of their obligations under the Food Stamp Program, asserting that the federal government could enforce its claims against the States through administrative offset procedures. Pet. App. 11a (citing 7 U.S.C. 2016(f), 2022(a); 7 C.F.R. Pt. 276). The court found inapplicable the principle that implied repeals of the common law are disfavored, holding that Congress had expressly chosen to exclude States from the category of persons liable for prejudgment interest. For the same reason, the court also declined to defer to the

contemporaneous construction of the Act by the implementing agencies. Pet. App. 11a-12a.

Finally, the court drew additional support for its conclusion from *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). The court noted that *Pennhurst* requires Congress to speak unambiguously when it seeks to impose conditions on the States pursuant to the spending power, and apparently concluded that *Pennhurst* governed in this case because the question of prejudgment interest was controlled by the applicable statutes. Pet. App. 13a.

SUMMARY OF ARGUMENT

I. The federal government's common-law right to collect prejudgment interest on debts owed by private parties and state and local governments has long been recognized. See, *e.g.*, *United States* v. *United States Fidelity & Guaranty Co.*, 236 U.S. 512, 528 (1915); *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939). The Debt Collection Act of 1982 codified and made mandatory the federal government's right to collect prejudgment interest from private parties, but did not affect the preexisting common-law rule with respect to the prejudgment-interest obligations of state and local governments.

A. The Debt Collection Act requires federal agencies to collect prejudgment interest from "person[s]." 31 U.S.C. 3717(a)(1). For purposes of Section 3717, however, the term "person" excludes state and local governments. 31 U.S.C. 3701(c). Thus, the Act expressly exempts those entities from its mandatory interest provisions, but does not affirmatively preclude collection of interest from those entities under the common law.

"Statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). Thus, where Congress has not provided a legal standard that directly resolves a particular question, recourse to federal common law is appropriate to "fil[l] a gap left by Congress' silence." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978).

Nothing in the text of the Debt Collection Act resolves the question whether the federal government retains its common-law right to collect prejudgment interest on debts owed by state and local governments. Instead, the Act merely declines to legislate with respect to that question. Accordingly, the common law rule continues to govern.

Congress's decision to exempt state and local governments from the provisions of Section 3717 is consistent with the conclusion that those entities remain subject to liability for prejudgment interest under the common law, because Section 3717 is considerably broader and more onerous than the common-law prejudgment-interest remedy. Under Section 3717, federal agencies are generally *required* to charge a specified interest rate, whereas the common law provides considerably more flexibility in determining whether prejudgment interest is appropriate and in selecting the rate of interest. Moreover, Section 3717 requires federal agencies to collect processing fees and delinquency penalties in addition to prejudgment interest; such fees and penalties are not available at common law. Given the nature of Section 3717, Congress may well have determined not to subject the States and local governments to its relatively strict provisions,

preferring instead to leave those entities subject to the more flexible and less onerous rule of the common law.

B. Even if it were not clear from the text of the Debt Collection Act that the federal government retains its common-law rights with respect to state and local governments, that conclusion would follow in any event, in light of the contemporaneous construction of the Act by the agencies responsible for its implementation. The General Accounting Office and the Department of Justice are charged with issuing regulations to implement the Debt Collection Act. 31 U.S.C. 3711(e)(2). In rulings and regulations issued shortly after adoption of the Act, those agencies took the position that the Act did not abrogate the federal government's common-law right to collect prejudgment interest on debts owed by state and local governments. See 4 C.F.R. 102.13(i); 49 Fed. Reg. 8889, 8894 (1984); Pet. App. 32a-45a. Deference is due to that reasonable agency interpretation of the statute. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

C. The legislative history of the Act provides further support for the conclusion that Congress did not intend to abrogate the federal government's common-law right to collect prejudgment interest from state and local governments. The Act was intended "[t]o increase the efficiency of Government-wide efforts to collect debts owed the United States and to provide additional procedures for the collection of debts owed the United States." 96 Stat. 1749. In particular, Congress sought to increase the availability and use of the prejudgment-interest remedy in hopes of increasing incentives for debtors to pay their government debts. S. Rep. No. 378, 97th Cong., 2d Sess. 3, 17 (1982). Nowhere was it suggested that the prejudgment-interest obligations of any debtor should be *lessened*. Accordingly, the Act cannot be construed to abrogate the common-law obligations of state and local governments, because neither the text nor the legislative history of the statute demonstrates that Congress intended to achieve that result.

It is clear that permitting state and local governments to evade their common-law prejudgment-interest obligations would be directly inconsistent with the purposes of the Act. The court of appeals found no such inconsistency because it believed that the administrative-offset provisions of the Food Stamp Program would permit the federal government to recoup amounts owed by the States, but that reasoning was incorrect. States would be able to delay payment of their Food Stamp Program debts and avoid both prejudgment interest and administrative offset by seeking full administrative review of all federal claims. Moreover, abrogation of the federal government's right to prejudgment interest would have a similar negative impact on all federal cooperative grant programs, not merely the Food Stamp Program. Thus, acceptance of that result would conflict with the fundamental purposes of the Debt Collection Act by creating incentives for state and local governments to delay payment of debts owed to the federal government in a wide variety of contexts.

II. Imposition of prejudgment interest on the State in the circumstances of this case would not run afoul of the plain-statement rule announced in *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981). In *Pennhurst*, the Court held that "Congress must express clearly its intent to impose

conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." *Id.* at 24. But prejudgment interest is not "a new obligation for participating States"; rather, it is one of "the remedies available against a noncomplying State," so the *Pennhurst* rule is not applicable. See *Bell* v. *New Jersey*, 461 U.S. 773, 790 n.17 (1983). Moreover, the federal government *did* "express clearly its intent to impose" prejudgment interest on States that failed to pay their Food Stamp Program debts in a timely manner; the federal government's right to collect prejudgment interest from the States has been recognized for many years, and was expressly reaffirmed in regulations issued well before the State incurred the debts at issue in this case. 49 Fed. Reg. 8894 (1984).

III. The debts at issue in this case are contractual debts, not "penalties," and thus they are appropriately subject to prejudgment interest under the common law. In *Rodgers* v. *United States*, 332 U.S. 371 (1947), the Court held that civil penalties do not accrue prejudgment interest because they are more analogous to criminal fines than to traditional financial obligations. But Texas's Food Stamp Program debts were incurred as a result of the operation of regulations that are expressly incorporated as terms of the contractual relationship between the State and the federal government. 7 C.F.R. 272.2, 274.3 (1986). Moreover, those debts are not "penalties" intended to punish the State, but rather reflect the contractual allocation of a portion of the actual financial loss suffered as a result of mail issuance of food stamp coupons. Accordingly, Texas's debts are clearly contractual obligations that may properly be subjected to prejudgment interest under the common law.

ARGUMENT

THE UNITED STATES RETAINS ITS COMMON-LAW RIGHT TO COLLECT PREJUDGMENT INTEREST ON DEBTS OWED BY THE STATES

I. THE DEBT COLLECTION ACT DID NOT ABROGATE THE FEDERAL GOVERNMENT'S COMMON-LAW RIGHT TO COLLECT PREJUDGMENT INTEREST ON DEBTS OWED BY STATE AND LOCAL GOVERNMENTS

Under the common law, the United States has long been entitled to collect prejudgment interest on debts owed it by private parties. See, *e.g.*, *Billings* v. *United States*, 232 U.S. 261, 284-288 (1914); *United States* v. *United States Fidelity & Guaranty Co.*, 236 U.S. 512, 528 (1915). That common-law right extends to debts owed by state and local government debtors as well; in *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939), the Court indicated that state and local governments could be liable for prejudgment interest in appropriate circumstances, depending on the interests of the two governments involved and considerations of "public convenience." *Id.* at 351. More recently, in *West Virginia* v. *United States*, 479 U.S. 305 (1987), the Court reaffirmed "the longstanding [common-law] rule that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money," and applied that rule to a debt owed to the United States by a State. *Id.* at 310.

In the Debt Collection Act of 1982, Congress codified and strengthened the federal government's right to collect prejudgment interest on debts owed by private debtors. Congress chose not to apply that

new statutory prejudgment-interest remedy to state and local government debtors, but it is clear from the text, contemporaneous administrative construction, and legislative history of the Debt Collection Act that it did not displace the preexisting common-law rules governing the prejudgment-interest obligations of state and local governments. Accordingly, those common-law rules continue to govern the relationship between the federal and state governments in this area.

A. The Text Of The Debt Collection Act Of 1982 Demonstrates That Congress Did Not Intend To Abrogate The Federal Government's Common-Law Right To Collect Prejudgment Interest From State And Local Governments

1. The Debt Collection Act requires federal agencies to collect prejudgment interest on every obligation owed to the United States "by a person." 31 U.S.C. 3717(a)(1).[1] The Act provides that, for purposes of Section 3717, the term "person" "does not include an agency of the United States Government, of a State government, or of a unit of general local government." 31 U.S.C. 3701(c). As a consequence, it is undeniable that the Act does not itself require the federal government to collect prejudgment interest from state and local governments, because those entities are expressly exempted from coverage under Section 3717. On the other hand, it is equally clear that nothing in the text of the Act affirmatively *precludes* collection of prejudgment interest from those entities; rather, the Act simply does not address the subject of prejudgment interest on debts owed by state and local governments.

It is well established that statutes in derogation of the common law are to be strictly construed, and that congressional intent to override the common law will not be lightly inferred. "Statutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). See also *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169-2170 (1991); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Env'tl Protection*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

Thus, only where Congress has "spoke[n] directly to a question" will congressional enactments be deemed to have supplanted the common law. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 315 (1981). Recourse to federal common law is inappropriate where

[1] In contrast to the rule under the common law, collection of prejudgment interest in circumstances covered by Section 3717 is generally mandatory: the statute provides that "[t]he head of an executive or legislative agency *shall* charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person." 31 U.S.C. 3717(a)(1) (emphasis added). Section 3717 also provides, however, that agency heads may, in keeping with standards issued by the Attorney General and the Comptroller General, promulgate regulations identifying cases in which a waiver of the statutory requirement of prejudgment interest may be permitted. 31 U.S.C. 3717(h); *see* 4 C.F.R. 102.13(g) (permitting waiver of interest after 30-day grace period "only in accordance with regulations issued by the agency identifying the standards and appropriate circumstances for waiver").

a federal statute or regulatory scheme establishes a legal standard that provides an answer to the precise question at issue in a case. See *City of Milwaukee*, 451 U.S. at 317-326; *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 623-626 (1978). But where Congress has not legislated with respect to a particular question, reference to federal common law is appropriate to "fil[l] a gap left by Congress' silence." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. at 625; see also *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. at 2170 (common law continues to govern "where Congress has failed expressly or impliedly to evince any intention on the issue"); *City of Milwaukee*, 451 U.S. at 323, 324-325 n.18.

The Debt Collection Act does not speak directly to the question of the federal government's right to prejudgment interest on debts owed by state and local governments—it does not "address[] the problem formerly governed by federal common law." *City of Milwaukee*, 451 U.S. at 315 n.8. Instead, the Act merely exempts state and local governments from the Act's *requirement* that prejudgment interest be collected and says nothing whatsoever about the propriety of collecting interest from those entities in circumstances where it would be available under the common law. Congress's mere refusal to legislate with respect to the prejudgment-interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in that area. Accordingly, recourse to the common law is required to "fil[l] [the] gap left by Congress' silence." *Mobil Oil Corp.*, 436 U.S. at 625.

2. Construing the Act to leave intact the federal government's common-law rights as against state and local governments would not conflict with Congress's

decision to exempt those entities from the provisions of Section 3717. The common-law liability of state and local governments for prejudgment interest is not coterminous with the provisions of the Act, and thus any congressional intent to treat those entities differently than private parties for purposes of prejudgment interest can be given full effect without overturning the federal government's common-law rights.

Section 3717 establishes a mandatory prejudgment interest rate—"the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point"—that must be imposed on all debts owed to the United States by "person[s]." 31 U.S.C. 3717(a). The common law, by contrast, is far more flexible, permitting the courts to look to "the relative equities between the beneficiaries of the obligation and those upon whom it has been imposed" and the other "general principles deemed relevant by the Court" in determining whether to impose prejudgment interest. *Rodgers* v. *United States*, 332 U.S. 371, 373 (1947). Imposition of prejudgment interest is far from automatic under the common law, particularly with respect to state and local government debtors: as the Court made clear in *West Virginia* v. *United States*, "before applying the usual rule regarding prejudgment interest as against a private party to a State, a federal court should consider the interests of the two governments involved." 479 U.S. at 309; see also *id.* at 311 n.3 (noting that equitable considerations may bar a common-law claim for prejudgment interest).[5] More-

[5] Section 3717 also sweeps more broadly than the common law in that it applies to all "amounts due" to the United

over, when prejudgment interest is imposed pursuant to the common law, the rate of interest is not necessarily the same as that called for by Section 3717; district courts instead may exercise wide discretion and look to a variety of sources in selecting the appropriate rate.[6]

The flexible nature of the common-law remedy is not the only significant difference between Section 3717 and the common law. In addition to mandating payment of prejudgment interest at the statutory rate, Section 3717 requires delinquent debtors to pay "a charge to cover the cost of processing and handling a delinquent claim." 31 U.S.C. 3717(e)(1); see 4 C.F.R. 102.13(d). Moreover, in the case of debts more than 90 days past due, "a penalty charge of not more than 6 percent a year" must be assessed on debtors subject to Section 3717. 31 U.S.C. 3717 (e)(2); see 4 C.F.R. 102.13(e). At common law, of course, neither processing fees nor penalty charges may be recovered.

In light of these differences between the common-law rule and Section 3717, Congress could well have

States, including civil fines and penalties as well as contractual debts. 31 U.S.C. 3701(b). Under the common law, by contrast, prejudgment interest is not available on criminal or civil fines. *Rodgers* v. *United States*, 332 U.S. 371 (1947).

[6] See, *e.g.*, *United States* v. *Dollar Rent A Car Systems, Inc.*, 712 F.2d 938, 940-941 (4th Cir. 1983); see also *Kilpatrick Marine Piling* v. *Fireman's Fund Ins. Co.*, 795 F.2d 940, 947-948 n.11 (11th Cir. 1986); *Equal Opportunity Employment Comm'n* v. *County of Erie*, 751 F.2d 79, 82 (2d Cir. 1984); *Sanders* v. *John Nuveen & Co.*, 524 F.2d 1064, 1075-1076 (7th Cir. 1975) (Stevens, J.), vacated on other grounds, 425 U.S. 929 (1976). In this case, the Department of Agriculture sought prejudgment interest at a rate of 7.625% per annum (see J.A. 7-8, 10-11), and the State did not dispute the appropriateness of that rate of interest.

decided, in the interests of federalism and comity, to leave state and local governments subject to the more flexible, and less onerous, regime of the common law rather than subjecting them to the strict and mandatory requirements of the Debt Collection Act. See *Gallegos* v. *Lyng*, 891 F.2d 788, 798 (10th Cir. 1989). That decision makes considerable sense, because the common-law rule permits courts to take account of the state or local governmental interests at stake in each case, and does not require the federal government to engage in the arguably unseemly activity of imposing delinquency penalties on sovereign States. In the absence of any statutory language suggesting a different outcome, therefore, the conclusion is inescapable that Congress did not intend to abrogate the federal government's common-law right to be made whole by seeking prejudgment interest from state and local government entities when it exempted those entities from the mandatory prejudgment-interest, processing-fee, and delinquency-penalty provisions of the Act.[7]

[7] The court of appeals justified its contrary decision in part by relying on Section 3717(g)(1), which renders Section 3717 inapplicable "if a statute, regulation required by statute, loan agreement or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges." The court reasoned that Section 3717(g)(1) was intended to allow "Congress to legislatively pick and choose where the imposition of interest is necessary." Pet. App. 12a. According to the court, Congress's failure to impose prejudgment interest under the Food Stamp Act in express terms demonstrated that Congress intended no prejudgment interest to be available in that context. *Ibid.* In suggesting that Section 3717(g)(1) sheds light on the prejudgment-interest obligations of state and local governments, however, the court of appeals ignored the fact that those entities are not subject to the provisions of

B. The Contemporaneous Construction Of The Debt Collection Act By The Agencies Charged With Administering It Further Demonstrates That The Act Did Not Abrogate The Federal Government's Common-Law Rights To Collect Prejudgment Interest From State And Local Governments

Fairly read, the Debt Collection Act cannot be construed to preclude imposition of prejudgment interest on the States and local governments under the common law. But even if the Court were not persuaded by that reading of the statute, the end result would be the same. At the very least, it must be conceded that the Act is reasonably susceptible of the interpretation that it leaves undisturbed the federal government's common-law rights in this area; that interpretation would not conflict in any way with the language, structure, or evident purposes of the Act. Accordingly, deference is due to the reasonable administrative determination that prejudgment interest is available in these circumstances.

The Department of Justice and the General Accounting Office (GAO) are charged with promulgating joint regulations to implement the Debt Collection Act. 31 U.S.C. 3711(e)(2). Those agencies have consistently viewed the Act as preserving the federal government's common-law right to seek prejudgment interest from state and local governments.

Shortly after adoption of the Act, GAO issued a ruling in which it concluded that the Debt Collection

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Section 3717 (including Section 3717(g)(1)) in the first place. 31 U.S.C. 3701(c). The obvious purpose of Section 3717(g)(1) was to allow for case-specific avoidance of the requirements of Section 3717 in circumstances where it would otherwise apply, not to cover the situation of debtors already exempted from that Section.

Act did not preclude the Department of Agriculture from relying on the common law to collect interest from state and local governments. See Decision No. B-212222 of the Comptroller General (Aug. 23, 1983), reproduced at Pet. App. 32a-36a. GAO later reaffirmed that position. See Letter from the Comptroller General to Senator Charles H. Percy (Jan. 5, 1984), reproduced at Pet. App. 37a-45a.

GAO and the Department of Justice conducted joint rulemaking proceedings to develop regulations implementing the Act. 49 Fed. Reg. 8889 (1984) (final rule); 48 Fed. Reg. 23,249 (1983) (proposed rule). The question whether common-law remedies survived the Debt Collection Act was explicitly raised in those proceedings. 49 Fed. Reg. 8889, 8894 (1984). The agencies concluded that "the Government has a judicially recognized common law right to charge interest on its debts" and that "the common law right to charge interest continues to exist." *Id.* at 8894. Accordingly, the final regulations implementing the Act provide that while "[t]he provisions of 31 U.S.C. 3717 do not apply * * * [t]o debts owed by any State or local government," federal "agencies are authorized to assess interest and related charges on debts which are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority." 49 Fed. Reg. 8901 (1984); 4 C.F.R. 102.13(i).

At a minimum, the Act is reasonably susceptible of the interpretation consistently articulated by GAO and the Department of Justice. Because that agency interpretation is a reasonable one, judicial deference is required. *Chevron U.S.A. Inc.* v. *Natural Resources*

Defense Council, Inc., 467 U.S. 837, 843-845 (1984); *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992). The rule of deference applies with particular force here, where the agency interpretation is a contemporaneous construction of the Act and is set forth in the implementing regulations themselves. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).[8]

C. The Legislative History Of The Debt Collection Act Supports The View That Congress Did Not Intend To Abrogate The Federal Government's Right To Collect Prejudgment Interest On Debts Owed By The States

1. As the court of appeals noted below, the provision of the Debt Collection Act exempting state and

[8] In their brief in opposition, respondents asserted that judicial deference is not due to the contemporaneous agency interpretations of the Debt Collection Act because such deference "applies more appropriately to interpretations of policy issues and not of questions of law." Br. in Opp. 18. Respondents err in assuming that agency interpretations of statutes can be neatly divided into "question of law" and "policy issues." Most agency decisions, including the decision at issue in this case, include elements of both law and policy.

In any event, as this Court's cases make clear, deference is due to an agency's reasonable interpretation of a statute it is charged to administer, even where that interpretation involves "questions of law" rather than "policy issues." See, *e.g.*, *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. at 1401-1402 (deferring to agency interpretation of statutory phrase); *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1767-1768 (1991) (same). Because the administrative interpretation of the Debt Collection Act does not conflict with the Act's plain language, judicial deference is required. *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988); see also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 843-845.

local governments from the definition of "person" was added on the Senate floor, and there is no legislative history explaining the reason for the amendment. Pet. App. 9a; see 128 Cong. Rec. 25,251-25,256 (1982); see also *West Virginia*, 479 U.S. at 312 n.6. Thus, nothing in the legislative history of the Act demonstrates the requisite "evident" "statutory purpose" to override the common law with respect to debts owed by state and local governments. *Isbrandtsen Co.* v. *Johnson*, 343 U.S. at 783. Accordingly, there is simply no basis for concluding that Congress intended to forbid collection of prejudgment interest from the States.

2. To the extent the legislative history of the Act sheds any light on Congress's intent in this area, moreover, it demonstrates that Congress would not have wanted to exempt state and local governments from their preexisting obligations to pay prejudgment interest under the common law. Congress's purpose in adopting the Act, as set forth in the Act's preamble, was "[t]o increase the efficiency of Government-wide efforts to collect debts owed the United States and to provide additional procedures for the collection of debts owed the United States." 96 Stat. 1749. Congress was concerned with the frequent failure of debtors to honor their obligations to the United States, and passed the Act solely in order to *strengthen* the collection process—not, as respondents apparently would have it, in order to create an incentive for state and local governments to evade their obligations to the United States.

The bill that became the Debt Collection Act was introduced in response to "increasing concern * * * expressed in Congress and elsewhere over the increasing backlog of unpaid debts owed the federal govern-

ment." S. Rep. No. 378, 97th Cong., 2d Sess. 2 (1982); see also *Hearings on S. 1249 Before the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. 1 (1981) (introductory remarks by Sen. Percy) ("The Federal Government's failure to collect billions of dollars in loans and other debts is a national outrage."). The Senate Committee on Governmental Affairs reported that a large proportion (over 50%) of debts owed to the federal government was overdue, and attributed this disturbing pattern of delinquencies to the fact that "[a]gencies do not have the motivation, resources, or tools to be aggressive and effective debt collectors." S. Rep. No. 378, *supra*, at 3.

One of the perceived weaknesses in the government's debt collection efforts was that "only limited use is made of interest charges to compensate for the government's cost of the money in the hands of the debtor." S. Rep. No. 378, *supra*, at 3. The Senate Report explained:

> In the absence of interest charges for delinquent payments, debtors have little or no incentive to make timely payments. Also, debtors are likely to pay their private sector debts first and their government debts last.

Id. at 17. See also *Senate Hearings*, *supra*, at 84 (testimony of Milton J. Socolar, Acting Comptroller General). Accordingly, the Act as ultimately adopted incorporated a variety of provisions to enhance the ability of federal agencies to collect debts and to recoup the full costs incurred as a result of debtors' failure to pay promptly.[9]

[9] As already noted, the Act mandated the imposition of prejudgment interest, penalties, and processing costs on private debtors who failed to pay their debts in a timely manner. Act § 11, 96 Stat. 1755-1756, codified as amended at 31 U.S.C. 3717. In addition, the Act *inter alia* (1) authorized greater use of credit bureaus by federal agencies, Act § 3, 96 Stat. 1749-1751, codified as amended at 31 U.S.C. 3701(a)(3), 3711(f)(1); (2) authorized agencies to utilize salary offsets to recover debts owed by federal employees, Act § 5, 96 Stat. 1751-1752, codified at 5 U.S.C. 5514; (3) made it a federal crime to kill or attempt to kill federal debt collection officials, Act § 6, 96 Stat. 1752, codified at 18 U.S.C. 1114; and (4) provided for collection of debts owed by private debtors through the use of administrative offsets, Act § 10, 96 Stat. 1754-1755, codified as amended at 31 U.S.C. 3716.

Congress's desire to tighten the incentives for prompt payment of debts owed the United States thus permeates the text and legislative history of the Act. Nowhere was it suggested that any debtor's burden should be alleviated. To be sure, Congress did ultimately choose not to include state and local governments within the category of "persons" subject to the mandatory prejudgment-interest, administrative-offset, delinquency-penalty, and processing-fee provisions of the Act, but there is no support for the proposition that Congress intended thereby to lessen the preexisting obligations of those entities. To the contrary, the Senate Report expressly recognized that state and local governments, while perhaps not the primary abusers of federal largesse, were nonetheless one component of the problem. See S. Rep. No. 378, *supra*, at 2 (referring to the "$126 billion * * * [of] domestic debt owed by individuals, businesses, educational institutions, *state and local governments*, and other organizations," but recognizing that the bulk of this debt was related to various federal loan programs) (emphasis added).

When the Debt Collection Act is read in light of its legislative history and purpose, the error of the

decision below is manifest. In effect, the court of appeals held that Congress affirmatively chose to create an incentive for state and local government debtors to delay payment of debts owed to the United States, and did so without any discussion or debate as part of a bill intended to *eliminate* incentives for such conduct. "[S]uch reticence while contemplating an important and controversial change in existing law is unlikely * * *. At the very least, one would expect some hint of a purpose to work such a change, but there was none." *Gallegos* v. *Lyng*, 891 F.2d at 799 (quoting *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979)). Particularly in light of the rule that congressional intent to overturn the common law will not be lightly inferred, the absence of any statutory text or legislative history suggesting congressional intent to eliminate the federal government's common-law rights compels the conclusion that those rights survived passage of the Act.[10]

3. The court of appeals found no inconsistency between the result it reached and the purposes of the Act, because it did "not agree that the states will have an incentive to shirk their debts incurred under

[10] *After* enactment of the Act, Senator Percy, who sponsored the amendment excluding state and local governments from the definition of "person," opined that in his view the federal government's right to collect prejudgment interest from the States had been eliminated by the Act. As the court of appeals acknowledged, however, such *post hoc* views are "not entitled to probative weight in the determination of legislative intent." Pet. App. 9a; see, *e.g.*, *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 118-119 (1988); *Bread Political Action Comm.* v. *Federal Election Comm'n*, 455 U.S. 577, 582 n.3 (1982); *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 132 (1974).

the Food Stamp Act if no interest is allowed." Pet. App. 11a. The court reasoned that the federal government could recover unpaid claims by utilizing the Food Stamp Program's administrative-offset procedure to withhold future payments to which the debtor State would otherwise be entitled. *Ibid.* (citing 7 U.S.C. 2016(f) and 2022(a); 7 C.F.R. Pt. 276). The court's reasoning was flawed in at least two respects.

In the first place, the court of appeals was simply wrong in its interpretation of the Food Stamp Act and implementing regulations. The regulations provide that "the filing of a timely appeal and request for administrative review shall automatically stay the action of FNS to collect the claim asserted against the State agency." 7 C.F.R. 276.7(e). Thus, unless the federal government is permitted to charge prejudgment interest on state debts, the States will have an incentive to seek administrative review of all claims regardless of merit, because the federal government is not permitted to seek an administrative offset until the administrative review process has run its course.

More importantly, the fact that the Food Stamp Program may in some circumstances allow the federal government to limit its losses through the use of an administrative-offset procedure is not relevant to the broader question of statutory construction at issue in this case. The question before this Court is whether the Debt Collection Act displaces the federal government's common-law right to collect prejudgment interest on the full range of debts that may be owed it by the States. Even assuming *arguendo* that the purposes of the Act would not be frustrated if the States were permitted to evade prejudgment

interest on Food Stamp Program debts, it is incontrovertible that the Act's purposes would be frustrated in numerous other contexts, where no administrative-offset procedure is available.[11] The court of appeals erred in justifying its decision solely by reference to the particular statutory scheme at issue in this case, because the logic of its decision would apply to all federal agencies and programs that lack express statutory authorization for the collection of prejudgment interest.

II. IMPOSITION OF PREJUDGMENT INTEREST ON THE STATES IN THE CIRCUMSTANCES OF THIS CASE WOULD NOT CONFLICT WITH *PENNHURST* v. *HALDERMAN*

The court of appeals apparently concluded that imposition of prejudgment interest on the State would be impermissible under *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981), because the Food Stamp Act and the Debt Collection Act do not themselves expressly require payment of interest under the circumstances of this case.[12] The court's reliance on *Pennhurst* was misplaced.

In *Pennhurst*, this Court declined to interpret precatory language in the Developmentally Disabled

[11] The Debt Collection Act itself created a general administrative-offset procedure. 31 U.S.C. 3716. State and local governments are expressly excluded from coverage under that provision, however, just as they are excluded from coverage under the prejudgment-interest provision. 31 U.S.C. 3701(c).

[12] Pet. App. 13a; see also *Arkansas* v. *Block*, 825 F.2d at 1258 n.7; *Perales* v. *United States*, 598 F. Supp. at 24. Contra *Gallegos* v. *Lyng*, 891 F.2d at 799-800; *Riles* v. *Bennett*, 831 F.2d 875, 877-878 & n.4 (9th Cir. 1987), cert. denied, 485 U.S. 988 (1988).

Assistance and Bill of Rights Act to impose affirmative obligations on States that accepted federal grants under the Act. The Court explained that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" 451 U.S. at 17. Accordingly, the Court announced a rule of statutory construction providing that "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds." *Id.* at 24.

Pennhurst is inapposite to the question of the States' liability for prejudgment interest on debts owed the United States. Prejudgment interest does not constitute "a new obligation for participating States," but is instead one of "the remedies available against a noncomplying State," and thus does not run afoul of *Pennhurst*. *Bell* v. *New Jersey*, 461 U.S. 773, 790 n.17 (1983). The *Pennhurst* Court's concern about construing federal statutes to impose new "affirmative obligations" of "largely indeterminate" scope on the States, see 451 U.S. at 24, is simply not implicated in this case.

Moreover, the federal government *did* "express clearly its intent to impose" prejudgment interest on debts owed by the States. The federal government's common-law right to prejudgment interest is part of the backdrop against which all contracts with the United States are entered into, and thus the attempt to enforce that right is not a new "condi-

tion[]" on the grant of federal funds to the States.[13] The federal government's consistent position that prejudgment interest may be imposed on debts owed by state and local governments was a matter of public record and federal law long before respondents incurred the debts at issue in this case,[14] as was the obligation of States to reimburse the federal government for mail issuance losses in excess of the regulatory tolerance level.[15]

Had respondents wished to avoid the imposition of prejudgment interest on obligations incurred pursuant to the mail loss regulations, they could have done so by withdrawing from the Food Stamp Program prior to incurring those obligations. By failing to do so, respondents "voluntarily and knowingly accept[ed] the terms of the 'contract,'" *Pennhurst*, 451 U.S. at 17, and subjected themselves to the normal remedies available to the federal government when

[13] Indeed, the Court's decision in *West Virginia* v. *United States* makes that clear. In that case, no statute or contractual provision expressly called for imposition of prejudgment interest on the State's debts, but the Court had no difficulty concluding that interest was due under the common law.

[14] See 49 Fed. Reg. 8894 (1984); *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939). Indeed, even prior to passage of the Debt Collection Act and promulgation of its implementing regulations, the United States had issued regulations providing for the collection of prejudgment interest in appropriate circumstances. The Federal Claims Collection Standards, issued in 1966 under the authority of the Federal Claims Collection Act of 1966, Pub. L. No. 89-508, § 3, 80 Stat. 308, 309, authorized the collection of prejudgment interest on debts owed the United States. See 31 Fed. Reg. 13,381, 13,382 (1966); see also 44 Fed. Reg. 22,702 (1979).

[15] See 48 Fed. Reg. 15,223 (1983).

it seeks to enforce its contractual rights. See *Bell* v. *New Jersey*, 461 U.S. at 790. Having chosen to accept the substantial financial benefits provided by the federal government to the States pursuant to the Food Stamp Program, respondents cannot now be permitted to evade the federal government's efforts to enforce its contractual rights and remedies under that program.

III. RESPONDENTS' OBLIGATIONS TO THE UNITED STATES ARE CONTRACTUAL OBLIGATIONS AND NOT PENALTIES, AND THUS THEY ARE APPROPRIATELY SUBJECT TO PREJUDGMENT INTEREST

In their brief in opposition to the petition for certiorari, respondents asserted that their obligation to reimburse the United States for mail issuance losses did not give rise to a contractual debt at all. Instead, according to respondents, their obligation to the United States is a "penalty" imposed unilaterally and arbitrarily by the Secretary of Agriculture. Br. in Opp. 4-5. As a result, respondents conclude, no interest is due in this case, because "penalt[ies]" are not subject to prejudgment interest. *Id.* at 5 (citing *Rodgers* v. *United States*, 332 U.S. 371, 374-376 (1947)). That contention is incorrect.

1. The State of Texas voluntarily chose to participate in the Food Stamp Program,[16] and by so doing it contractually bound itself to comply with the federal regulations governing the program. Pet. 3-4;

[16] State participation in the Food Stamp Program is not mandatory, but is encouraged by the generous federal benefits provided under the program.

Br. in Opp. 1.[17] States participating in the program, including Texas, are required to sign a "Federal/State Agreement," which is "the legal agreement between the State and the Department of Agriculture" and "is the means by which the State elects to operate the Food Stamp Program." 7 C.F.R. 272.2(a)(2) (1986). Pursuant to the express terms of the Federal/State Agreement, each State and the Department of Agriculture contractually agree "to act in accordance with the provisions of the Food Stamp Act of 1977, as amended, [and its] implementing regulations * * *. The State and [the Department] further agree to fully comply with any changes in Federal law and regulations." 7 C.F.R. 272.2(b)(1) (1986). Thus, the federal Food Stamp Program regulations, and all amendments thereto, are expressly incorporated as terms of the contract between the federal government and each State that participates in the program.

The mail loss tolerance regulations applied in this case were adopted on an interim basis on November 9, 1982 (see 47 Fed. Reg. 50,681), and in final form on April 8, 1983 (see 48 Fed. Reg. 15,223). The mail issuance losses at issue here did not occur until 1986. Pet. 4. Thus, at the time those mail issuance losses were incurred, the contract between respondents and the United States expressly provided that respondents would reimburse the United States for all such losses in excess of the regulatory tolerance level. Respondents' belated attempt to deny the contractual nature of their debt is without foundation.

[17] Respondents appear to concede this point. Indeed, they specifically relied below on "[t]he 'contractual' nature of the relationship between the administering State agency and the federal government which arises from a State's participation in the Food Stamp Program." Resp. C.A. Br. 15.

2. Nor are respondents correct in asserting that their liability for excessive mail losses constitutes a "penalty" that is exempt from prejudgment interest under *Rodgers* v. *United States*, 332 U.S. 371 (1947). In *Rodgers*, the federal government imposed civil penalties on a farmer who marketed cotton in excess of his statutory quota, and sought to impose prejudgment interest on the penalty amount. The Court held that those penalties were more analogous to criminal fines—which do not accrue prejudgment interest—than to more traditional financial obligations, and accordingly declined "to add [prejudgment] interest to th[e] very substantial penalties already imposed upon non-cooperating farmers." 332 U.S. at 376.

This case, by contrast, involves recoupment pursuant to contract of actual financial losses suffered by the federal government, not the imposition of fines or penalties for the purpose of punishing prohibited conduct. The mail loss tolerance regulations do not impose penalties. Rather, they simply allocate to the States certain financial losses that result from the operation of the Food Stamp Program—losses that would otherwise be borne exclusively by the federal government, which is obligated to redeem food stamp coupons, including those issued as replacements for lost or stolen coupons. See 7 U.S.C. 2013(a); 7 C.F.R. 274.6. Since respondents' debt is a contractual obligation rather than a fine or penalty, imposition of prejudgment interest is appropriate. *West Virginia* v. *United States*, 479 U.S. 305, 310 (1987) ("[P]arties owing debts to the Federal Government must pay prejudgment interest *where the underlying claim is a contractual obligation to pay money*.") (emphasis added).

CONCLUSION

The judgment of the court of appeals should be reversed and remanded for further proceedings.

Respectfully submitted.

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

1. 7 U.S.C.:

§ 2016. Issuance and use of coupons

* * * * *

(f) State issuance liability

Notwithstanding any other provisions of this chapter, the State agency shall be strictly liable to the Secretary for any financial losses involved in the acceptance, storage and issuance of coupons, including any losses involving failure of a coupon issuer to comply with the requirements specified in section 2020(e)(20) of this title, except that in the case of losses resulting from the issuance and replacement of authorizations for coupons and allotments which are sent through the mail, the State agency shall be liable to the Secretary to the extent prescribed in the regulations promulgated by the Secretary.

* * * * *

2. 31 U.S.C.:

§ 3701. Definitions and application

* * * * *

(c) In sections 3716 and 3717 of this title, "person" does not include an agency of the United States Government, of a State government, or of a unit of general local government.

* * * * *

§ 3717. Interest and penalty on claims

(a)(1) The head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point. The Secretary of the Treasury shall publish the rate before November 1 of that year. The rate is effective on the first day of the next calendar quarter.

(2) The Secretary may change the rate of interest for a calendar quarter if the average investment rate for the 12-month period ending at the close of the prior calendar quarter, rounded to the nearest whole percentage point, is more or less than the existing published rate by 2 percentage points.

(b) Interest under subsection (a) of this section accrues from the date—

(1) on which notice is mailed after October 25, 1982, if notice was first mailed before October 25, 1982; or

(2) notice of the amount due is first mailed to the debtor at the most current address of the debtor available to the head of the executive or legislative agency, if notice is first mailed after October 24, 1982.

(c) The rate of interest charged under subsection (a) of this section—

(1) is the rate in effect on the date from which interest begins to accrue under subsection (b) of this section; and

(2) remains fixed at that rate for the duration of the indebtedness.

(d) Interest under subsection (a) of this section may not be charged if the amount due on the claim is paid within 30 days after the date from which interest accrues under subsection (b) of this section. The head of an executive or legislative agency may extend the 30-day period.

(e) The head of an executive or legislative agency shall assess on a claim owed by a person—

(1) a charge to cover the cost of processing and handling a delinquent claim; and

(2) a penalty charge of not more than 6 percent a year for failure to pay a part of a debt more than 90 days past due.

(f) Interest under subsection (a) of this section does not accrue on a charge assessed under subsection (e) of this section.

(g) This section does not apply—

(1) if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges; and

(2) to a claim under a contract executed before October 25, 1982, that is in effect on October 25, 1982.

(h) In conformity with standards prescribed jointly by the Attorney General and the Comptroller General, the head of an executive or leg-

islative agency may prescribe regulations identifying circumstances appropriate to waiving collection of interest and charges under subsections (a) and (e) of this section. A waiver under the regulations is deemed to be complaince with this section.

3. 4 C.F.R.:

§ 102.13 Interest, penalties, and administrative costs.

* * * * *

(i) *Exemptions.* (1) The provisions of 31 U.S.C. 3717 do not apply: (i) To debts owed by any State or local government;

* * * * *

(2) However, agencies are authorized to assess interest and related charges on debts which are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority.

4. 7 C.F.R. (1986):

§ 272.2 Plan of operation.

(a) *General purpose and content*—

* * * * *

(2) *Content.* The basic components of the State Plan of Operation are the Federal/State Agreement, the Budget Protection Statement, and the Program Activity Statement. * * * The Federal/State Agreement is the legal agreement between the State and the Department of Agriculture. This Agreement is the means by which

the State elects to operate the Food Stamp Program and to administer the program in accordance with the Food Stamp Act of 1977, as amended, regulations issued pursuant to the Act and the FNS-approved State Plan of Operations. * * *

(b) *Federal/State Agreement.* (1) The wording of the pre-printed Federal/State Agreement is as follows:

The State of —— and the Food and Nutrition Service (FNS), U.S. Department of Agriculture (USDA), hereby agree to act in accordance with the provisions of the Food Stamp Act of 1977, as amended, implementing regulations and the FNS-approved State Plan of Operation. The State and FNS (USDA) further agree to fully comply with any changes in Federal law and regulations. This agreement may be modified with the mutual written consent of both parties.

PROVISIONS

The State agrees to: 1. Administer the program in accordance with the provisions contained in the Food Stamp Act of 1977, as amended, and in the manner prescribed by regulations issued pursuant to the Act; and to implement the FNS-approved State Plan of Operation.

* * * * *

§ 274.3 Issuance of coupons through the mail.

(a) *Types of mail issuance systems.* The State agency may issue some or all of the coupon allotments through the mail. State agencies shall determine whether to use a regular mail issuance

system or a direct coupon mailing system. A regular mail issuance system is one which uses an authorization document as an intermediate step in mail issuance. A direct coupon mailing system is one which does not use an authorization document. The State agency shall design the controls and forms to operate a regular or direct coupon mail issuance system.

* * * * *

(c) *Coupons lost in the mail prior to receipt.* (1) The State agency shall issue replacement coupons only if the coupons are reported stolen from the mail or lost in the mail in the period of their intended use and the household requesting the replacement has not already been issued two replacements in the previous 5 months.

* * * * *

(2) On at least a monthly basis the State agency shall report all losses to the postal authorities. State agencies shall, in cooperation with the Postal Service, attempt to determine the cause of each nondelivery and take appropriate corrective action. State agencies shall also report to the postal authorities all patterns of losses in particular project areas or neighborhoods.

* * * * *

(4) FNS will assume financial liability for coupons lost in the mail except as follows:

(i) In mail issuance reporting areas with $300,000 or more of mail issuance in a quarter, the State agency shall be strictly liable to FNS for the value of all mail issuance losses in excess of 0.75 percent during the 2nd, 3rd, and 4th

quarters of fiscal year 1983, and in excess of 0.5 percent per quarter thereafter, of the dollar value of each reporting unit's quarterly mail issuance.

* * * * *

(iii) For the purpose of this section, "mail issuance" means all original coupon issuances distributed through the mail. "Mail loss" means all replacements of mail issuances except for replacements of returned mail issuances.

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(6)

No. 91-1729

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

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UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners

v.

STATE OF TEXAS AND
TEXAS DEPARTMENT OF HUMAN SERVICES,
Respondents

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

****

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

Whether the Debt Collection Act abrogated prior common law permitting awards of prejudgment interest against the States.

Whether the Secretary of Agriculture's unilateral imposition of liability on a State for direct mail delivery losses under the Food Stamp Act is a contractual debt subject to prejudgment interest, or a penalty and not subject to prejudgment interest.

Whether awarding prejudgment interest against the State of Texas would violate the principles of *Pennhurst State School & Hospital v. Halderman*, where the Food Stamp Act does not provide for prejudgment interest on discretionary penalties awarded against a State, and the Debt Collection Act expressly exempts the States from prejudgment interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND REGULATIONS

MISCELLANEOUS

No. 91-1729

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Debt Collection Act of 1982, Pub. L. No. 97-365, § 11, 96 Stat. 1755-1756, as amended, 31 U.S.C. §§ 3701(c), 3714, 3716, and 3717, pertinent provisions of the Food Stamp Program, 7 U.S.C. § 2016(f), and the regulations promulgated thereunder, 7 C.F.R. §§ 276.1 and 276.2, are reproduced in the Appendix, *infra*.

STATEMENT OF THE CASE

Respondents accept in general the factual description presented by Petitioners, with the following addendum concerning the Food Stamp Program, 7 U.S.C. §§ 2011 *et seq.* The Food Stamp Program is a program administered jointly by the Federal and State Governments in which state agencies (in Texas, the Texas Department of Human Services) make

eligibility determinations and authorize low-income households to obtain food stamp coupons. The coupons themselves are obligations of the Federal Government and are redeemable at face value by providers. The coupons are delivered to the State agency by the United States Department of Agriculture. The Act provides that liability may be imposed upon the State by the Secretary for failure by the State to properly execute the administrative functions associated with eligibility determinations and distribution of coupons. In most cases such liability is contingent upon a finding by the Secretary that the State was negligent or otherwise at fault. 7 U.S.C. § 2020(h). The statute has, however, long held States strictly liable for the "acceptance, storage and issuance" of the food stamp coupons. However, the original law provided that if the coupons were distributed to households through the U. S. Mail, the State's liability ended once the coupons were put into possession of the United States Postal Service. Accordingly, States adopted strict security measures with respect to the storage and transportation of the coupons while the coupons were in the custody and control of the State or its agents. None of the losses which resulted in State liability being challenged in this case resulted from losses which occurred while the coupons were in the custody and control of the State or any of its agents.

In 1981, the Food Stamp Act was amended permitting the Secretary to make States liable to some degree for mail issuance losses. 7 U.S.C. § 2016(f). The regulatory scheme adopted by the Secretary recognized that mail issuance losses were an exception to the strict liability applicable to other issuance activities. Nevertheless, the Secretary unilaterally established a "tolerance level" for losses above which States would be held strictly liable without regard to any fault on the part of the State or its agents, nor would the State be permitted to demonstrate fault on the part of any third party. 7 C.F.R. § 276.2(b)(2)(4).

Understandably, following the adoption of interim rules on this subject, many States took issue with various aspects of the Secretary's regulations and recommended that State agencies not be held accountable for mail issuance losses

directly related to Postal Service operations. 48 Fed. Reg. 15225. On April 9, 1986, the Department of Agriculture published proposed rules in which the Secretary clearly and unambiguously indicated that the Food and Nutrition Service would adjust claims for mail issuance losses where such relief was warranted. The criteria for determining when such relief would be warranted specifically made reference to a situation in which the State continued to issue food stamp coupons through the mail in order to aid an investigation by the U.S. Postal Service or other law enforcement agencies into heavy mail issuance losses. See 51 Fed. Reg. 12268, at 12275.

SUMMARY OF ARGUMENT

The Debt Collection Act of 1982, 31 U.S.C. § 3701 *et seq.*, was enacted by Congress to improve the collection of debts owed the federal government. Section 3701(c) of the act expressly exempted the States from the imposition of prejudgment interest under the act on debts owed to the federal government. Prior federal common law permitted the federal government to assess such interest against the States. In the Debt Collection Act, however, Congress went beyond merely omitting a remedy for a class of individuals or entities subject to the statute; it expressly removed the remedy. The plain reading of the statute evinces Congressional intent to shield the States from prejudgment interest. Exempting the States from prejudgment interest (§ 3717) and administrative offsets § 3716) does not contravene the stated purposes of the act, and represents a reasonable balancing of interests by the Congress. Finally, subsequent amendments to the Food Stamp Act demonstrate that Congress purposefully retained the flexibility to impose prejudgment interest in those situations it felt most appropriate, and that it knew how to impose such interest.

Deference to prior federal common law is misplaced in this setting. Congress has spoken to the issue at bar; to require the degree of specificity sought by the Petitioners would mandate that Congress affirmatively proscribe any and all common law doctrines. Deference to federal common law does

not surmount statutory Congressional intent to the contrary. Deference to federal common law is weaker than the deference owed substantive state common law. Doctrines against the implied abrogation of common law are of limited relevance in this case. Finally, merely because some federal agencies have made interpretations of § 3701(c) and its possible abrogation of federal common law does not mean that federal courts must defer to and adopt mistaken interpretations.

The Secretary's imposition of unilateral and unreviewable sanctions for losses under the Food Stamp Program are penalties, not contractual debts. As penalties, prejudgment interest is inappropriate. There is no improper use of federal monies, the time value of which must be disgorged from the States and returned to the federal government. The losses that resulted in the penalty were the result of theft by third parties in the U.S. Postal Service.

The imposition of prejudgment interest for unilateral penalties assessed by the Secretary violates the principles of *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981). The Food Stamp Act was silent on the issue of prejudgment interest, so the State of Texas could hardly have bargained for this measure. Because the Debt Collection Act abrogated prior federal common law, this implied remedy in unavailable. The original penalty is a punitive measure, and hence prejudgment interest is not necessary to provide the federal government with full compensation.

ARGUMENT

I. THE DEBT COLLECTION ACT ABROGATED ANY PRIOR FEDERAL COMMON LAW PERMITTING AWARDS OF PREJUDGMENT INTEREST AGAINST THE STATES.

Prior to the judgment of the District Court, the Food Stamp Act, 7 U.S.C. § 2001 *et seq.*, was silent as to the imposition of prejudgment interest on claims against the States.[1] The Debt Collection Act, 31 U.S.C. §3701 *et seq.*, however, expressly exempts the States from its provision imposing prejudgment interest on claims owed the Federal Government. Section 3716 of the Debt Collection Act provides for administrative offsets as a method of collecting claims owed the United States. Respondents' Appendix. Section 3717 provides for interest and penalties on debts owed the United States. Respondents' Appendix. Section 3701(c) provides:

> In sections 3716 and 3717 of this title, 'person' does not include an agency of the United States Government, of a State government, or of a unit of general local government.

The Secretary of Agriculture maintains that the United States Department of Agriculture (USDA) is permitted nonetheless to impose prejudgment interest on the State of Texas pursuant to federal common law. See *West Virginia v. United States*, 479 U.S. 305, 107 S.Ct. 702 (1987). In particular, the Secretary maintains that the enactment of § 3701(c), which expressly exempts the States from prejudgment interest, did not expressly *prohibit* the imposition of prejudgment interest on the States, and therefore § 3701(c) did not abrogate prior federal common law permitting such interest.

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[1] Section 2022 was amended in November of 1990, subsequent to the judgment in the District Court, expressly providing for prejudgment interest for claims brought under the quality control provisions of § 2025 of the Food Stamp Act.

In contrast, Respondents agree with the Court of Appeals for the Fifth Circuit that Congress had addressed this issue when it expressly exempted the states from prejudgment interest, and thus abrogated the federal common law. Congress does not have to expressly and affirmatively act in order to abrogate *federal* common law. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 315, 101 S.Ct. 1784, 1791 (1981).

The primary focus of this dispute, then, is the correct interpretation of § 3701(c) of the Debt Collection Act. The Fifth Circuit held that the intent of Congress was to exempt the States from prejudgment interest unless expressly authorized by statute. *State of Texas*, 951 F.2d at 651. *See also*, *Perales v. United States*, 751 F.2d 95 (2nd Cir. 1984) (per curiam), *affirming*, 598 F.Supp. 19 (S.D.N.Y. 1984); *Penn. Dept. of Public Welfare v. United States*, 781 F.2d 334 (3rd Cir. 1986); *Arkansas by Scott v. Block*, 825 F.2d 1254 (8th Cir. 1987). The Secretary maintains that this express statutory exemption from prejudgment interest does not equate with an abrogation of the common law permitting prejudgment interest, that prohibiting the States from prejudgment interest is contrary to the purposes of the Debt Collection Act, and that finding an implied abrogation of common law is improper. *Citing Gallegos v. Lyng*, 891 F.2d 95 (10th Cir. 1989); *County of St. Clair v. United States Dept. of Labor*, 754 F.2d 375 (6th Cir. 1984) (Table).

As a matter of statutory construction, the Secretary's position is extreme. Furthermore, the Secretary relies too heavily on the "brooding omnipresence" of federal common law. Neither can outweigh the clear expression of Congressional intent to exempt the States from prejudgment interest.

A. Statutory construction of an express statutory exemption from prejudgment interest evidences Congressional intent to prohibit imposition of prejudgment interest.

Any analysis of statutory construction necessarily begins with the language of the statute. *Bread Pol. Action Committee v. Fed. Elect. Comm.*, 455 U.S. 577, 580, 102 S.Ct. 1235, 1237-38 (1982). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.*, quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056 (1980). There is no dispute among the parties that the language of § 3701(c) of the Debt Collection Act exempts the agencies of the Federal Government, the States, and units of local government from the provisions of § 3716 (administrative offset) and § 3717 (interest and penalty on claims).

The Secretary maintains, however, that merely exempting the States from the provision providing for the imposition of mandatory prejudgment interest does not mean that Congress meant to exempt the States from the remedy of discretionary common law prejudgment interest. In other words, Petitioners argue that an express exemption from a statutory provision providing for a mandatory remedy is not a clear indicator of Congressional intent to preclude the discretionary imposition of the same remedy pursuant to federal common law.[2]

In *United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668 (1988), this Court addressed a similar effort at statutory interpretation regarding the Civil Service Reform Act of 1978.[3] In *Fausto* the Court decided whether the statutory omission of judicial review as a remedy for a class of employees was meant

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[2] The Secretary, as well as the Tenth Circuit in *Gallegos v. Lyng*, 891 F.2d at 797, also rely on this Court's reservation of the issue at bar in *West Virginia v. United States*, 479 U.S. 305, 312 n.6, 107 S.Ct. 702, 707 n.6 (1987), for the proposition that the issue of statutory construction is not clear.

[3] Pub.L. 95-454, 92 Stat. 111 et seq., codified, as amended, in various sections of 5 U.S.C. (1982 ed. and Supp. IV).

to preclude a similar remedy that existed pursuant to prior federal statutory and common law.

> The question we face is whether that withholding of remedy was meant to preclude judicial review for those employees, or rather merely to leave them free to pursue the remedies that had been available before enactment of the CSRA. The answer is to be found by examining the purpose of the CSRA, the entirety of its text, and the structure of review that it establishes.

Id. at 443-44, 108 S.Ct. at 672, citing *Lindahl v. OPM*, 470 U.S. 768, 779, 105 S.Ct. 1620, 1627 (1985), and *Block v. Community Nutrition Institute*, 467 U.S. 340, 345, 104 S.Ct. 2450, 2453-54 (1984).

There can be little doubt that the purpose of the Debt Collection Act is to improve the claim collection efforts of the Federal Government. "The major purpose of this legislation is to facilitate substantially improved collection procedures in the federal government." S. Rep. No. 97-378, 97th Cong., 2nd Sess. 4, *reprinted in* 1982 U.S. Code Cong. & Admin. News, 3377-78. In contrast, there is little legislative history evidencing Congress' intent in passing § 3701(c), exempting the States from the prejudgment provisions of the Debt Collection Act. *West Virginia*, 479 U.S. at 312 n.6, 107 S.Ct. at 707 n.6; *State of Texas*, 951 F.2d at 650.

In drafting the Debt Collection Act, Congress created statutory provisions that it believed would address the perceived problems facing the Federal Government by:

> (1) referring delinquent debtors to credit bureaus while providing those debtors the same protections now afforded the private sector under the Fair Credit Reporting Act, (2) requiring individuals to supply their social security number when applying for credit or financial assistance which would result in indebtedness to the government, (3) offsetting a federal employee's salary and certain benefits to satisfy general debts owed the government, (4) making it a federal penalty to assault federal employees collecting debts owed the government, (5) determining delinquent tax liability and seeking its resolution before extending federal credit, (6) disclosing mailing addresses obtained from the Internal Revenue Service on delinquent debtors to private contractors for debt collection purposes, (7) clarifying that administrative setoff of delinquent debts the government exists beyond the six-year statute of limitations, (8) assessing interest on debts owed the government and penalties on those debts that are delinquent, (9) easing the requirements for serving summonses in order to litigate delinquent debt cases, (10) reporting to Congress on debt collection activities, and (12) allowing federal departments and agencies to contract with private collections agencies for collection services.

Senate Report 97-378, at 3377-78. Even a casual review of these remedial measures indicates that Congress was primarily interested in addressing private delinquent debtors, not state delinquent debtors.

The Secretary argues, however, that exempting prejudgment interest for the States creates a perverse incentive with regard to the overall Congressional purpose of the Debt Collection Act. Petitioners' Brief at 22-28. While it seems clear that the overall purpose of the Act is the improvement of the collection of claims owed to the federal government, there are several reasons why the express exemption for the States from §§ 3716 and 3717 contained in § 3701(c) does not create perverse incentives.

First, the legislative history is silent with regard to Congress' perception of and intent to solve claim collection

problems *with the States*;[4] the clear focus of Congress was on private debtors, not the States. *E.g.*, Senate Report 97-378 at 3379 ("The $25 billion in delinquencies consists of $13.2 billion in unpaid taxes, $7.7 billion in overdue loans, and the remainder for overdue interest and overpayments to program beneficiaries."). The Secretary points to language in Senate Report 97-378 that mentions state and local governments as among those owing $126 billion to the Federal Government, in an effort to place State debtors squarely in the forefront of Congressional intent. Petitioners' Brief at 25. This $126 billion figure, however, merely refers to total indebtedness, not delinquent debt. Nowhere in Senate Report 97-378 is there an express statement that the States are a significant component of the delinquent debtor problem Congress was attempting to resolve through passage of the Debt Collection Act of 1982. Absent the perception of a serious delinquency problem at the state level, it is not perverse that Congress would exempt the sovereign States from two of the harsher collection measures of the Act, the administrative setoffs of § 3716 and the imposition of prejudgment interest under § 3717.

Second, the imposition of strict liability on the States for direct mail delivery losses in the U.S. Postal Service over tolerance levels set by the Secretary was the result of unilateral action by the Secretary. The waiver of this strict liability is completely discretionary with the Secretary. The statute further provides that the States must resort first to administrative appeals of this discretionary action by the Secretary. There is no effective final judicial review of these discretionary acts by the Secretary. *State of Texas*, 951 F.2d at 648-49. To impose prejudgment interest on the States for the time period spent waiting for a final administrative determination can be highly inequitable; delays in any final decision are just as likely to arise from the adversarial efforts of the USDA as from a State, and delays may also arise independently from within the administrative review process. Prejudgment interest would

[4] Section 3701(c) also exempts federal agencies and local government units. There is no legislative history indicating any perceived problem in collecting debts from any of these governmental entities.

operate as a disincentive for states to exercise their rights to administrative review. Congress could well have determined that imposing prejudgment interest against the States was not equitable under these circumstances.

Third, many federal agencies have program offsets available to them to collect a claim against a State. The Debt Collection Act itself evidences such a provision, § 3714, that expressly provides for offsets against the States under certain circumstances.[5] Nonetheless, Petitioners argues that because some statutes do not provide for setoff authority,[6] this remedy would not be available universally in the absence of the ability to impose prejudgment interest. The important point concerning administrative offsets, however, is that they are an option Congress knows it has available to utilize when it deems appropriate.

Finally, the case at bar does not involve a misuse of government funds in violation of statutory purpose. *E.g.*, *Bell v. New Jersey*, 461 U.S. 773, 103 S.Ct. 2187 (1983); *Riles v. Bennett*, 831 F.2d 875 (9th Cir. 1987) (per curiam), *cert. denied*, 485 U.S. 988 (1988). In those latter cases federal monies are indeed misallocated, and hence the time value of money is a necessary element of full compensation. *West Virginia*, 479 U.S. at 311, 107 S.Ct. at 706; *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654-55, 103 S.Ct. 2058, 2062-63 (1983). In contrast, the action by the Secretary makes Texas liable for losses due to third party actions that were not adequately curtailed by state *and* federal law enforcement. Texas did not spend federal monies outside program parameters, and hence prejudgment interest is not necessary to make the federal government whole. There are no "fruits of the infringement" that need to be "disgorged" from Texas, and no windfalls have been granted. *Devex Corp.*, 461 U.S. at 654-55,

[5] Congress exempted the States from the general administrative setoff provisions in § 3716. Yet in § 3714 there is an express provision for setoffs against the States in the case of State default on stocks or bonds issued by the State and held in trust by the Federal Government.

[6] The Food Stamp Act does provide for administrative offsets. 7 U.S.C.A. §§ 2016(f), 2022(a).

103 S.Ct. at 2062. Because prejudgment interest would not make the federal government whole, it is not perverse for Congress to have exempted them from this penalty.

In sum, it is hardly perverse for Congress to draft a statute enhancing the ability of the Federal Government to collect on delinquent debts, and therein avoid subjecting the States to two of the harsher measures aimed at private delinquent debtors.

It is, in fact, the Secretary's interpretation that is more circuitous and strained. In essence Petitioners argues that the intent of Congress was to establish an elaborate debt collection regimen that includes the imposition of prejudgment interest, then to exempt expressly the States from several of these provisions in order that the States be exposed silently to basically the same liability of prejudgment interest pursuant to prior common law. Such an interpretation defies the plain meaning of the statute and is an ambiguous and devious *post hoc* imposition of a program liability on the States. See also *United States v. Fausto*, 484 U.S. at 445-48, 108 S.Ct. at 672-74; *Block v. Community Nutrition Institute*, 467 U.S. at 345, 104 S.Ct. at 2453-54; *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 472-75, 79 S.Ct. 904, 909-11 (1959).

Section 3717(g)(1) of the Debt Collection Act is further evidence that Congress meant to exercise its authority in determinations of whether prejudgment interest is merited for claims against the States. Section 3717(g)(1) provides that § 3717 does not apply "if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges...." Petitioners are correct that, pursuant to § 3701(c), § 3717(g)(1) does not apply to claims against the States. However, the relevance of § 3717(g)(1) is that this section is yet another indication of the intent of Congress to permit itself to determine those circumstances where the imposition of prejudgment interest would be appropriate.[7] It is another

[7] This is in fact the *post hoc* explanation of § 3701(c) given by the amendment's sponsor, Senator Percy. See *State of Texas*, 951 F.2d at 649-50. See also Senate Report No. 97-378 at 3393. ("These provisions will generate an incentive for the debtor to pay while protecting the debtor and the social objective of the government programs by allowing flexibility in the assessment of the interest and penalty charges.").

indication that Congress has addressed the issue of prejudgment interest directly, and that it desires to balance the interests and equities involved as it sees fit.

Moreover, Congress has on several occasions expressly imposed prejudgment interest on the States, such as in the Medicaid Act, 42 U.S.C. § 1396b(d)(5), and in the Social Security Act, 42 U.S.C. § 418(j). Subsequent to the decision of the District Court in the case at bar, Congress amended the Food Stamp Act itself, effective November 1990, to expressly provide for prejudgment interest for violations of the quality control provisions of § 2025.[8] The most natural reading of this new provision is that it is a limited and express imposition of a new liability, rather than a redundant codification of common law. In other words, Congress knows how to impose prejudgment interest if it wants to.

The exemption of the States from the prejudgment interest provision in the comprehensive federal claim collection statute is clear. Given that Congress has addressed the issue, it is inappropriate for federal district courts to "supplement" the statute with remedies Congress expressly exempted. Moreover, the exemption is not perverse, and in fact is a quite plausible result of the typical balancing of interests that properly occurs in Congress.

B. The Debt Collection Act abrogated prior federal common law permitting the imposition of prejudgment interest against the States.

The Secretary argues that the statutory exemption contained in § 3701(c) did not directly and affirmatively prohibit the imposition of basically the same remedy under federal common law, that deference is due to common law remedies, and that implied repeals of common law remedies are not favored. What seems obvious, though, is that § 3701(c) signals

[8] 7 U.S.C. § 2022.

Congressional intent to exempt the States from at least one incarnation of prejudgment interest. Moreover, the Secretary mistakes the deference due state common law with the much more limited role of federal common law, improperly requires Congress to affirmatively proscribe prior federal common law, and unduly expands the judicial maxim disfavoring implied repeals of common law.

Federal courts are not general common law courts. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 313, 101 S.Ct. 1784, 1790 (1981); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822 (1938). This Court has nonetheless recognized limited circumstances in which federal courts have limited authority to formulate federal common law. *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 640, 101 S.Ct. 2061, 2067 (1981). These circumstances include situations where a "federal rule of decision is 'necessary to protect uniquely federal interests,'" *Id.*, quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426, 84 S.Ct. 923, 939 (1964), situations where Congress has delegated to the courts the authority to develop substantive law, *Texas Industries*, at 640, 101 S.Ct. at 2067, citing *Wheeldin v. Wheeler*, 373 U.S. 647, 652, 83 S.Ct. 1441, 1445 (1963), and situations in which the federal courts are called upon to fill in the interstices or gaps in federal statutes. *E.g.*, *Kamen v. Kemper Financial Services, Inc.*, __ U.S. __, 111 S.Ct. 1711, 1717 (1991).

The federal common law rules governing the imposition of prejudgment interest prior to the enactment of the Debt Collection Act were discussed by this Court in *West Virginia*, *supra*, and *Rodgers v. United States*, 332 U.S. 371, 68 S.Ct. 5 (1947). Under federal common law, prejudgment interest was granted or denied by a federal district court by looking to the Congressional purposes behind the obligation, "in the light of general principles deemed relevant by the Court." *Id.* at 373, 68 S.Ct. at 7. In *West Virginia* this Court expressly reserved judgment on whether the Debt Collection Act abrogated the common law regarding prejudgment interest remedies against the States. *Id.* at 312 n. 6, 107 S.Ct. at 707 n.6. The refusal to

reach an analysis that would only be *dictum* in a case brought under a contract that predated the Debt Collection Act does not mandate the conclusion, as Petitioners suggest, that the plain meaning of the statute is less than clear.

The Secretary, given this background of federal common law permitting the imposition of prejudgment interest, argues that the claimed ambiguity of § 3701(c) and § 3717 of the Debt Collection Act requires that the statute "be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." Petitioners' Brief at 9, quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 72 S.Ct. 1011, 1014 (1952). Respondents maintain, however, that the intent of Congress was to the contrary, and that any deference proper in the federal courts is due state common law, not federal common law.

As discussed *supra*, the plain meaning of § 3701(c) prohibits an assessment of prejudgment interest on the States. "The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious intended legislative purpose or lessen the scope plainly intended to be given to the measure." *Isbrandtsen Co. v. Johnson*, 343 U.S. at 783, 72 S.Ct. at 1015, quoting *Jamison v. Encarnacion*, 281 U.S. 635, 640, 50 S.Ct. 440, 442 (1930). See also *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. at 97, 101 S.Ct. at 1583 ("In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.")

The issue of whether a statute has abrogated or preempted the common law is a question of whether Congress "spoke directly to a question." *City of Milwaukee*, at 315, 101 S.Ct. at 1791. But, contrary to the claims of Petitioners, an abrogation of federal common law does not require that "Congress had affirmatively proscribed the use of federal common law." *City of Milwaukee*, at 315, 101 S.Ct. at 1791.

"Federal common law is a 'necessary expedient,'...and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.*, at 314, 101 S.Ct. at 1791.

Petitioners argue that, because Congress did not speak to the precise issue of *preclusion* of the remedy of prejudgment interest when it exempted the States from this remedy under the Debt Collection Act, Congress had not "spoken directly to the issue," and the federal courts were free to "fil[l] a gap left by Congress' silence." Petitioners' Brief at 15-16, quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 2015 (1978). Rather than refraining to impose a judicial common law remedy on sovereign States only when "Congress has failed expressly *or impliedly* to evince *any* intention on the issue," *Astoria Federal Sav. & Loan Ass'n v. Solimino*, 111 S.Ct. 2166, 2170 (1991) (emphasis added), the Secretary insists on strictly construing § 3701(c) and requiring Congress to "affirmatively proscribe" the availability of a federal common law remedy. See *U.S. v. Fausto*, 484 U.S. at 454-55, 108 S.Ct. at 677 (rejecting "a rule akin to the doctrine that statutes in derogation of the common law will be strictly construed").

In interpreting the Death on the High Seas Act,[9] for example, this Court stated that although the Act "does not address every issue of wrongful death law,...when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. at 625, 98 S.Ct. at 2015. To supplement the Debt Collection Act with the imposition of an identical federal common law remedy, even if it is discretionary, surely makes the statutory exemption meaningless. Congress "spoke directly to a question" of prejudgment interest against the States, and exempted the States. The Secretary has provided no evidence or argument suggesting that the express exemption of the States from the provisions of §§ 3716 and 3717, indicates Congressional concern for the encouragement and preservation of

[9] 46 U.S.C.A. §§ 761-67.

"supplemental remedies." *Mobil Oil*, 436 U.S. at 625, 98 S.Ct. at 2015; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 397-98, 90 S.Ct. 1772, 1785 (1970).

The Secretary also argues that deference is due to common law remedies, and that implied repeals of common law remedies are not favored. These cases are not federal common law cases, such as the case at bar; instead, these cases concern either state common law, *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 106 S.Ct. 755 (1986), or substantive law that has been historically delegated to the federal courts for its full development. *E.g.*, *Moragne v. States Marine Lines, Inc.*, *supra*; *Mobil Oil Corp. v. Higginbotham*, *supra*.

This Court has observed that deference is more appropriate when a federal statute is in possible derogation of *state* common law rather than *federal* common law. *City of Milwaukee*, at 316, 101 S.Ct. at 1792 (citing the importance of federalism and the "historic police powers of the States").

> Such concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required. Indeed, as noted, in cases such as the present, 'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.

Id., at 316-17, 101 S.Ct. at 1792. The common law at issue in the case at bar is neither maritime law, nor state common law; it is federal common law creating a remedy that was considered and rejected by Congress.

The Petitioners cite *Isbrandtsen Co. v. Johnson* for support for the proposition that implied repeals of long-standing common law doctrines are not favored. Petitioners' Brief at 9, 15. *Isbrandtsen* is a case wherein the continued vitality of prior maritime common law permitting employers to setoff certain

expenses against the wages of seamen was questioned due to the enactment by the Congress of Shipping Commissioners Act of 1872. This Court held that, even though Congress had not expressly precluded shippers from utilizing the setoff remedy available to them under prior common law, by listing all the setoffs or deductions an employer could use under the act, the prior common law setoff remedy was "preempted." *Id.* at 738, 72 S.Ct. at 1017. "Congress, in effect, has excluded all [other remedies] except those which it has listed affirmatively." *Id.* at 739, 72 S.Ct. at 1017. In the case at bar, Congress has not only enumerated those remedies available to the Federal Government, it has expressly exempted the States from two of them. *Isbrandtsen* can be of no assistance to Petitioners.

Nor does *Mobil Oil Corp. v. Higginbotham* offer support for the Secretary's position. In *Mobil Oil*, this Court addressed the relationship between the intent and remedies of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*, and the available state law remedies for wrongful death occurring within territorial waters. The Death on the High Seas Act excluded all remedies for almost all claims within the territorial waters. *Id.* at 620-22 & n.11, 98 S.Ct. at 2012 & n.11. At issue was whether the federal courts could supplement the remedies provided by Congress for deaths outside territorial waters. The Supreme Court in *Mobil Oil* held that Congress had enumerated the remedies for deaths on the high seas, and that supplementation was precluded. *Id.* at 625, 98 S.Ct. at 2015. The Court distinguished the holding in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772 (1970), by noting that *Moragne* involved a case wherein the federal courts were supplementing an area of law where the federal statute had delegated most regulation to state law. Moreover, the Court had concluded "that Congress withheld a statutory remedy in coastal waters in order to encourage and preserve supplemental remedies." *Mobil Oil*, at 625, 98 S.Ct. 2015, citing *Moragne*, 398 U.S. at 397-98, 90 S.Ct. 1785-86. The *Mobil Oil* Court

rejected the effort to implant a common law remedy on a statutory regimen.

Nowhere in the Debt Collection Act, or in the legislative history, is there any hint that Congress meant to encourage the supplementation of the Act by resort to other areas of law. Nor has Congress historically delegated the area of revenue recovery and debt collection to the federal courts for the development of rules of decision. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil*, at 625, 98 S.Ct. at 2015.

Federal common law is not a "brooding omnipresence in the sky," requiring obeisance and deference and strict construction of federal statutes. *c.f. Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222, 37 S.Ct. 524, 531 (1917) (J. Holmes, dissenting). Petitioners have not come forward with any colorable evidence of Congressional intent to retain either specific federal common law doctrines or of an intent to encourage "supplementation" of its statutory remedies. Nor can Petitioners rely on the out-of-context doctrine disfavoring the implied repeal of common law rules. Section 3701(c) of the Debt Collection Act removed the remedy of prejudgment interest from those available to the Federal Government in collecting debts from the States.

C. Deference to federal agencies in their interpretations of § 3701(c) of the Debt Collection Act is required only where the agency interpretation is a reasonable one.

Petitioners cite to several interpretations of the Debt Collection Act by the General Accounting Office (GAO) and the Department of Justice (DOJ) that support its contention that the Debt Collection Act permits the imposition of prejudgment interest on the States. Petitioners' Brief at 20-22. Upon examination, the Fifth Circuit found these legal opinions of the

GAO and the DOJ to be unpersuasive and lacking precedent. *State of Texas*, 951 F.2d at 651. Petitioners, however, argue that the Court of Appeals was wrong because it failed to accord the proper deference to the statutory interpretation of the agencies charged with applying the Act. Because this principle applies more appropriately to interpretations of policy issues and not of questions of law, the Fifth Circuit was correct in not deferring to the agencies' construction of § 3701(c) and the intent of Congress.

Federal courts are charged with both the authority and the responsibility to correct errors in law made by federal agencies. *SEC v. Chenery Corp.*, 318 U.S. 80, 94, 63 S.Ct. 454, 462 (1943); *Florida Dept. of Labor v. U.S. Dept. of Labor*, 893 F.2d 1319, 1321-22 (11th Cir. 1990). Judicial deference to agency statutory interpretations is, as the Secretary acknowledges, required only where the interpretation is a reasonable one. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2782-83 (1984); Petitioners' Brief at pp. 12-13. Nevertheless, "[i]f the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*, at 842-43, 104 S.Ct. at 2781. Since Congress expressly exempted the States from prejudgment interest and did intend to abrogate the common law, the Court of Appeals was not required to adopt an agency interpretation that it found unreasonable. See *Commonwealth of Penn. Dept of Public Welfare* v. United States, 781 F.2d 334, 342 ("Because the Act's language is clear, we will not defer to the administrators who construe it differently."). The federal courts are not required to "allow misconceptions in law that arise during the agency decision-making process to go unchecked," *Florida Dept. of Labor*, 893 F.2d at 1322, nor remand for further agency determinations where the evidence shows that further agency deliberation would be futile. *Id.*, at 1324.

II. THE SECRETARY'S UNILATERAL IMPOSITION OF LIABILITY ON A STATE FOR DELIVERY LOSSES UNDER THE FOOD STAMP ACT IS NOT A CONTRACTUAL DEBT SUBJECT TO PREJUDGMENT INTEREST, BUT RATHER A PENALTY NOT SUBJECT TO PREJUDGMENT INTEREST.

The obligation of Texas to pay money to the United States is a result of a unilateral decision by the Secretary of Agriculture. The decision to impose strict liability for direct mail delivery losses above an arbitrary "tolerance level" in the U.S. Postal Service was unilateral and a complete reversal of prior law. *State of Texas v. United States*, 951 F.2d 645, 648-49 (5th Cir. 1992); *Gallegos v. Lyng*, 891 F.2d 788, 789 (10th Cir. 1992). There were no arm's length negotiations between the Secretary and the States. The imposition of the obligation to pay was purely discretionary with the Secretary and, as the court below held, is not subject to judicial review. If the obligation were a debt created by a contractual arrangement, judicial review of disputes arising from that contractual relationship would be required. Moreover, the imposition of strict liability for delivery losses over the tolerance level for use of the U.S. Postal Service was opposed by many States, including Texas. 51 Federal Register 12268. This liability operates as a penalty for losses due to the actions of third parties; it is punitive and meant to force the States to adopt alternate and much more costly distribution schemes for the delivery of food stamps, and is not an effort to disgorge monies illegally diverted from the Food Stamp Act.

Accordingly, the "debt" on which the United States seeks to collect interest, pursuant to federal common law, is not a debt created by some contractual agreement requiring prejudgment interest for full and complete compensation for that debt. *See West Virginia*, 479 U.S. 305, 107 S.Ct. 702 (1987). Rather, it is a penalty, and as such is not subject to

prejudgment interest. *Rodgers v. United States*, 332 U.S. 371, 374-76, 68 S.Ct. 5, 7-8 (1947).[10]

III. BECAUSE THE FOOD STAMP ACT DOES NOT PROVIDE FOR PREJUDGMENT INTEREST ON DISCRETIONARY PENALTIES AWARDED AGAINST A STATE, AND THE DEBT COLLECTION ACT EXPRESSLY EXEMPTS THE STATES FROM PREJUDGMENT INTEREST, AWARDING PREJUDGMENT INTEREST AGAINST THE STATE OF TEXAS WOULD VIOLATE THE PRINCIPLES OF *PENNHURST STATE SCHOOL & HOSPITAL V. HALDERMAN.*

The Fifth Circuit found that imposing prejudgment interest on the States as a result of a violation of the Food Stamp Act was a violation of the principles in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981). *State of Texas*, 951 F.2d at 651. Petitioners maintain nonetheless that this was error, that *Gallegos v. Lyng*, *supra*, was correctly decided, that enactment of the Debt Collection Act did not abrogate the common law remedy of prejudgment interest against States, and that the United States retains, pursuant to *Bell v. New Jersey*, 461 U.S. 773, 103 S.Ct. 2187 (1983), all implied remedies as part of the "backdrop" against which the States contracted for the Food Stamp Program. Petitioners' Brief at 29-31.

Respondents do not dispute that as a general rule the Federal Courts have the power to award appropriate relief for the violation of federal statutes, *Franklin v. Gwinnett County Public Schools*, __ U.S. __, 112 S.Ct. 1028, 1035 (1992), and that prior federal common law did provide for prejudgment interest against the States in certain circumstances. *West*

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[10] If the imposition of a monetary claim against the State based upon the intentional acts of third parties and the unilateral and non-reviewable fiat of the Secretary is *not* a penalty, then Respondents are hard-pressed to conceive what sort of claim *would* be a penalty.

Virginia, 479 U.S. at 312, 107 S.Ct. at 707. The applicability of *Gwinnett County* and *West Virginia* to the case *sub judice* is limited because of the punitive, non-contractual nature of the liability, the fact that the violation resulting in the assessment of the penalty was unintentional, and that the Debt Collection Act abrogated any prior common law exposing the States to prejudgment interest.

The Secretary's unilateral actions denied Texas the ability to "voluntarily and knowingly accept[] the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17, 101 S.Ct. at 1540. *State of Texas*, 951 F.2d at 651; *Perales v. United States*, 598 F.Supp. 19 (S.D.N.Y. 1984), *aff'd*, 751 F.2d 95 (2nd Cir. 1984)(per curiam); *State of Arkansas by Scott v. Block*, 825 F.2d 1254, 1258 n.7 (8th Cir. 1987), *reh'g and reh'g en banc denied*; *Commonwealth of Penn.*, 781 F.2d at 342 n.13. Because the Food Stamp Act does not expressly provide for this liability, the Fifth Circuit found that any such additional unbargained-for liability would not conform to the contractual nature of Spending Clause statutes such as the Food Stamp Act. *State of Texas*, 951 F.2d at 651.

The *Gallegos* Court, however, held that the imposition of prejudgment interest was not a new condition or obligation of program participation, but simply a "remed[y] available against a noncomplying State." *Gallegos v. Lyng*, 891 F.2d at 800, quoting *Bell v. New Jersey*, 461 U.S. 773, 103 S.Ct. 2187 (1983). The *Gallegos* Court, relying further on *West Virginia*, *supra*, applied a commercial debt analogy to this unilateral imposition of liability and interest, and determined that prejudgment interest was an "element of compensation" that was "commonly awarded to the nonbreaching party." *Gallegos v. Lyng*, 891 F.2d at 800. The reasoning of the *Gallegos* Court is wrong for several reasons.

First, this Court's holding in *West Virginia* is inapposite to the case at bar because, contrary to the situation in that case, the contract in effect between the State of Texas and the U.S. Department of Agriculture when the liabilities at issue were created was entered into after October 25, 1982, and consequently is subject to the Debt Collection Act. Second, the

enactment of the Debt Collection Act abrogated the prior common law remedy of prejudgment interest discussed in *West Virginia*. Third, Congress expressly enumerated the remedies available to the United States in the Debt Collection Act, thereby removing the presumption of all available remedies. *Gwinnett County*, __ U.S. at __, 112 S.Ct. at 1035-36 n.6. Fourth, as discussed in Section II, *supra*, the liability for direct mail delivery losses is punitive in character; punitive damages are not an element of complete compensation, and are not required to make a party whole. The *Gallegos* Court's reliance on *Riles v. Bennett*, *supra*, is misplaced for this very reason; *Riles* is an instance of misuse of federal program monies, and hence prejudgment interest is a proper element of full compensation.

Moreover, the imposition of implied remedies is limited by *Pennhurst* where the alleged violation is unintentional. *Pennhurst*, 451 U.S. at 28-29, 101 S.Ct. at 1545-46. "The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." *Gwinnett County*, __ U.S. at __, 112 S.Ct. at 1037. The strict liability imposed upon the State of Texas by the Secretary was for the actions of third parties over whom, as employees of the U.S. Postal Service, the State of Texas had no control. In sum, any unilateral imposition of punitive damages liability and concomitant prejudgment interest without judicial review must conflict with the holding in *Pennhurst* that implied remedies are limited under Spending Power statutes.

CONCLUSION

Respondents respectfully request that this Court affirm the appealed decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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ON THE BRIEF

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

1. 7 U.S.C. § 2016(f). State issuance liability.

Notwithstanding any other provision of this chapter, the State agency shall be strictly liable to the Secretary for any financial losses involved in the acceptance, storage and issuance of coupons,..., except that in the case of losses resulting from the issuance and replacement of authorizations for coupons and allotments which are sent through the mail, the State agency shall be liable to the Secretary to the extent prescribed in the regulations promulgated by the Secretary.

2. 7 C.F.R. § 276.1 Responsibilities and Rights.

(a) Responsibilities. (1) State agencies shall be responsible for establishing and maintaining secure control over coupons and cash for which the regulations designate them accountable. Except as otherwise provided in these regulations, any shortages or losses of coupons and cash shall strictly be a State agency liability and the State agency shall pay to FNS, upon demand, the amount of the lost or stolen coupons or cash, regardless of the circumstances.

3. 7 C.F.R. § 276.2 State agency liabilities.

(a) General provisions. Notwithstanding any other provision of this subchapter, State agencies shall be responsible to FNS for any financial losses involved in the acceptance, storage and issuance of coupons. ..State agencies shall pay to FNS, upon demand, the amount of any such losses.

(b)(4) A State agency shall be held strictly liable for mail issuance losses that are in excess of the tolerance level that corresponds to the preselected reporting unit.

31 U.S.C.:

§ 3701. Definitions and application

* * * * *

(c) In sections 3716 and 3717 of this title, "person" does not include an agency of the United States Government, of a State government, or of a unit of general local government.

* * * * *

§ 3714. Keeping money due States in default

The Secretary of the Treasury shall keep the necessary amount of money the United States Government owes a State when the State defaults in paying principal or interest on investments in stocks or bonds the State issues or guarantees and that the Government holds in trust. The money shall be used to pay the principal or interest or reimburse, with interest, money the Government advanced for interest due on the stocks or bonds.

* * * * *

§ 3716 Administrative Offset

(a) After trying to collect a claim from a person under section 3711(a) of this title, the head of an executive or legislative agency may collect the claim by administrative offset. The head of the agency may collect by administrative offset only after giving the debtor—

(1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;

(2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

(b) Before collecting a claim by administrative offset under subsection (a) of this section, the head of an executive or legislative agency must prescribe regulations on collecting by administrative offset based on—

(1) the best interests of the United States Government;

(2) the likelihood of collecting a claim by administrative offset; and

(3) for collecting a claim by administrative offset after the 6-year period for bringing a civil action on a claim under section 2415 of title 28 has expired, the cost effectiveness of leaving a claim unresolved for more than 6 years.

(c) This section does not apply—

(1) to a claim under this subchapter that has been outstanding for more than 10 years; or

(2) when a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved.

§ 3717. Interest and penalty on claims

(a) (1) The head of an executive or legislative

agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point. The Secretary of the Treasury shall publish the rate before November 1 of that year. The rate is effective on the first day of the next calendar quarter.

(2) The Secretary may change the rate of interest for a calendar quarter if the average investment rate for the 12-month period ending at the close of the prior calendar quarter, rounded to the nearest whole percentage point, is more or less than the existing published rate by 2 percentage points.

(b) Interest under subsection (a) of this section accrues from the date—

(1) on which notice is mailed after October 25, 1982, if notice was first mailed before October 25, 1982; or

(2) notice of the amount due is first mailed to the debtor at the most current address of the debtor available to the head of the executive or legislative agency, if notice is first mailed after October 24, 1982.

(c) The rate of interest charged under subsection (a) of this section—

(1) is the rate in effect on the date from which interest begins to accrue under subsection (b) of this section; and

(2) remains fixed at that rate for the duration of the indebtedness.

(d) Interest under subsection (a) of this section may not be charged if the amount due on the claim is paid within 30 days after the date from which interest accrues under subsection (b) of this section. The head of an executive or legislative agency may extend the 30-day period.

(e) The head of an executive or legislative agency shall assess on a claim owed by a person—

(1) a charge to cover the cost of processing and handling a delinquent claim; and

(2) a penalty charge of not more than 6 percent a year for failure to pay a part of a debt more than 90 days past due.

(f) Interest under subsection (a) of this section does not accrue on a charge assessed under subsection (e) of this section.

(g) This section does not apply—

(1) if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges; and

(2) to a claim under a contract executed before October 25, 1982, that is in effect on October 25, 1982.

(h) In conformity with standards prescribed jointly by the Attorney General and the Comptroller General, the head of an executive or legislative agency may prescribe regulations identifying circumstances appropriate to waiving collection of interest and charges under subsections (a) and (e) of this section. A waiver under the regulations is deemed to be compliance with this section.

No. 91-1729

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA

AND

UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

STATE OF TEXAS

AND

TEXAS DEPARTMENT OF HUMAN RESOURCES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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Respondents contend that the Debt Collection Act of 1982 unambiguously abrogates the federal government's common-law right to seek prejudgment interest on debts owed by the States, but they have failed to support that position or to respond persuasively to the contrary arguments set forth in our opening brief. As we demonstrate there, the language of the Act itself does not address the continued viability of

the common-law remedy, and there is no inconsistency between that remedy and the structure or purpose of the Act. Moreover, the congressional purpose in adopting the Act militates strongly in favor of retention of the common-law rule. Those considerations in themselves suffice to require reversal of the decision below, but there is more: the agencies charged with responsibility for implementing the Act have consistently interpreted it to preserve the federal government's common-law remedy, and the presumption in favor of retaining long-established common-law rules likewise requires that result.

1. a. Respondents essentially concede, as they must, that the agencies charged with its implementation have consistently interpreted the Debt Collection Act to leave undisturbed the federal government's common-law right to seek prejudgment interest on debts owed by state and local governments. Resp. Br. 19-20. Accordingly, respondents cannot prevail unless they can demonstrate that their contrary interpretation is the *only* plausible reading of the Act. *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992) (deferring to "plausible" agency interpretation of statutory term); see generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984).[1] Respondents cannot meet that burden.

[1] Respondents appear to suggest (Br. 20) that deference to the longstanding agency interpretation of the Act is not appropriate in this case because the principle of *Chevron* deference "applies more appropriately to interpretations of policy issues and not of questions of law." Respondents cite no support for that proposition, however, nor do they explain why the question at issue in this case should be deemed a pure "question of law" despite its evident and significant policy implications. In any event, as we explain in our opening brief (U.S. Br. 22 n.8), this Court has consistently deferred to agency interpretations on matters that are no less "questions of law" than is the question presented in this case.

The text of the Debt Collection Act itself is unquestionably "silent or ambiguous with respect to the specific issue" presented in this case (*Chevron*, 467 U.S. at 843); respondents do not appear to dispute that point. Nor do respondents point to anything in the Act's legislative history that could provide the requisite "clear" or "unambiguously expressed intent of Congress" necessary to overturn the administrative construction of the statute. *Id.* at 842-843. Ultimately, then, respondents are left with nothing to support their preferred construction of the Act other than the at-best dubious inference that Congress, despite its clearly expressed goal of enhancing the federal government's ability to collect debts, chose to exempt the States from the provisions of 31 U.S.C. 3717 not merely in order to avoid imposing additional burdens on sovereign governments but also in order to abrogate the common-law prejudgment-interest remedy and thereby create an unprecedented incentive for States to delay paying their debts to the federal government.

Even if respondents' interpretation of the Act were not implausible on its face, the most that could be said for it would be that it is a possible reading of Congress's intent. Had Congress truly intended to preclude the common-law prejudgment-interest remedy in this context, it is certainly reasonable to expect that that intention would have been expressed in some form—if not in the language or structure of the statute itself, then at least in its legislative history. Given the absence of any such expression of congres-

sional intent, respondents cannot meet their burden of demonstrating that the administrative construction of the Act is unreasonable.

b. Respondents dispute the applicability in this case of the settled rule that statutes are to "be read with a presumption favoring the retention of long-established and familiar principles," and that "statutes in derogation of the common law are to be strictly construed." Resp. Br. 15 (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)). Even if respondents were correct in that regard, the result here would be the same, because respondents nonetheless cannot show that the longstanding administrative interpretation of the Debt Collection Act is unreasonable. In any event, respondents' attempts to rebut the presumption favoring retention of the common law are unpersuasive.

Respondents err in asserting (Br. 15) "that any deference proper in the federal courts is due state common law, not federal common law." While it is true that the presumption in favor of retaining settled common-law rules is at its strongest in the context of state common law (see *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 316-317 (1981)), this Court has applied that presumption in cases involving federal common law as well. See, *e.g.*, *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169-2170 (1991) (federal common-law rule of preclusion); *University of Tennessee* v. *Elliott*, 478 U.S. 788, 794, 797 (1986) (same); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. at 783 (federal maritime common law).[2] It is hardly surprising that this should be so;

[2] Respondents suggest (Br. 17) that the presumption, if applicable to federal common law at all, is applicable only in

after all, the presumption in favor of preserving federal common law is merely an application of the more general rule that "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989).

Respondents also err in recasting in extreme terms our reliance on the presumption in favor of the common law. Contrary to respondents' mischaracterization (Br. 16), we do not contend that Congress must " 'affirmatively proscribe' the availability of a federal common law remedy" in order to abrogate the federal common law in a particular area. Rather, we rely on this Court's consistent admonitions that Congress will not be deemed to have supplanted federal common-law rules unless it has spoken directly to the particular question at issue or has otherwise clearly indicated its intention to abrogate the common law.[3]

the context of "substantive law that has been historically delegated to the federal courts for its full development." That contention appears to overlook this Court's application of the presumption in cases such as *Solimino* and *Elliott* and, in any event, lacks force here since federal courts have historically played a leading role in developing the substantive law of remedies (including prejudgment interest).

[3] *United States* v. *Fausto*, 484 U.S. 439 (1988), is not to the contrary. That case did not involve a statute in derogation of a well-established rule of federal common law. Instead, the question before the Court was whether a comprehensive statutory scheme governing federal personnel actions was intended to modify the preexisting judicial interpretation of another statute, the Back Pay Act. *Id.* at 453-455. Moreover, the result would have been the same in *Fausto* even if the Court had had occasion to apply the presumption in favor of long-settled common-law rules, because Congress's intent to abrogate the previous judicial construction of the Back Pay

Each of the cases relied on by respondents is consistent with this understanding of the presumption favoring retention of federal common law. Thus, in *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, *supra*, and *Isbrandtsen Co.* v. *Johnson*, *supra*, the Court found direct evidence in the structure and purpose of the particular statutes at issue that Congress clearly and affirmatively intended to abrogate the common law. See *Solimino*, 111 S. Ct. at 2171-2172 (finding clear implication that Congress intended to abrogate common-law preclusion principles because a portion of the statute would otherwise "be left essentially without effect"); *Isbrandtsen Co.*, 343 U.S. at 783 (construing statute to abrogate common-law set-off rule in light of the "obviously * * * remedial, beneficial and amendatory character" of the statute, and in order to "make effective [the statute's] design to change the general maritime law so as to improve the lot of seamen"); see also *id.* at 783-787. The language and structure of the Debt Collection Act, by contrast, shed no light on the question whether the federal government retains its common-law prejudgment-interest remedy as against the States, and Congress's express purpose in adopting the Act

Act was clear from the structure and purpose of the statute. As the Court explained, Congress had expressly intended "to replace the haphazard arrangements for administrative and judicial review of personnel action" with "an integrated scheme of administrative and judicial review." *Id.* at 444, 445. Thus, Congress's failure to provide for judicial review for a particular class of employees "display[ed] a clear congressional intent to deny" review (*id.* at 447), particularly in light of the fact that a contrary interpretation would have been directly inconsistent with two structural elements of the statute at issue. *Id.* at 449-451.

points in the direction of retaining, rather than eliminating, that remedy.

Similarly, in *City of Milwaukee* v. *Illinois*, *supra*, and *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978), the Court found that Congress had expressly adopted a legal standard to govern the precise question at issue. See *City of Milwaukee*, 451 U.S. at 315, 317-324 & n.18 (concluding that Congress had "spoke[n] directly to [the] question[s]" of effluent limitations and overflows by creating a comprehensive regulatory scheme under which permits had been issued by the responsible regulatory agencies to address those precise issues); *Mobil Oil Corp.*, 436 U.S. at 623-625 (declining to adopt federal common-law rule governing the type of damages recoverable for deaths on the high seas where Congress had adopted a statute providing an answer to that question, and observing: "The Act does not address every issue of wrongful-death law, * * * *but when it does speak directly to a question*, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless") (emphasis added).[4]

In enacting the Debt Collection Act, Congress did not "speak directly" to the question of the federal government's ability to collect prejudgment interest on debts owed by state and local governments (see 436 U.S. at 625); rather, it merely declined to enhance

[4] Respondents also cite (Br. 15) *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981), but that case is wholly inapposite. The presumption in favor of retaining long-settled common-law rules was not implicated in *Northwest Airlines*, because the purported common-law rule sought by the petitioner in that case did not in fact exist. See *id.* at 96-97 ("no such general federal right [to contribution] has been recognized").

that ability by subjecting the States to the provisions of Section 3717. Nor would preservation of the common-law prejudgment-interest remedy in cases involving state and local governments serve to render "meaningless" (436 U.S. at 625) or "without effect" (*Solimino*, 111 S. Ct. at 2171) Congress's decision to exempt those entities from the scope of Section 3717. As we explain in detail in our opening brief (U.S. Br. 14 n.4, 16-19), the remedy created by Section 3717 is broader than the common law in numerous respects, and thus it was eminently reasonable for Congress to decide not to impose that enhanced remedy on state and local government debtors, leaving them subject instead to the traditional and more flexible rule of the common law.[5] Thus, the presumption in favor of retaining long-established federal common-law rules compels the conclusion that the Debt Collection Act did not abrogate the federal government's right to seek prejudgment interest on debts owed by the States.

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[5] Respondents err in asserting (Br. 12, 13, 16) that preservation of the common law would subject the States to the "same" or "identical" liability as that imposed by Section 3717. The differences between Section 3717 and the common-law remedy are substantial. For example, Section 3717 *requires* federal agencies to seek prejudgment interest in most instances; the common law does not. See U.S. Br. 14 n.4. An award of prejudgment interest under Section 3717 is mandatory; the common-law remedy is left to the discretion of the courts. *Id.* at 17. Section 3717 specifies the interest rate to be applied; the common law does not. *Id.* at 17-18. Section 3717 requires the collection of penalties and processing fees from delinquent debtors; the common law does not. *Id.* at 18. Section 3717 imposes prejudgment interest on all amounts due the United States, including fines and penalties; the common law does not. *Id.* at 17-18 n.5.

c. As we explain in our opening brief (U.S. Br. 23-28), respondents' approach would create additional obstacles to the federal government's ability to collect debts, which is precisely the result that Congress sought to avoid in adopting the Debt Collection Act. Permitting States and their political subdivisions to delay payment of debts owed to the federal government at no cost to themselves would create a financial incentive for those entities to engage in such delay—an incentive that could be all the more tempting in light of the ongoing fiscal difficulties of state and local governments. Respondents' attempts to belittle this difficulty with their preferred construction of the Act are unpersuasive.

Respondents first suggest (Br. 9-10) that construing the Act to bar imposition of prejudgment interest on state and local governments would not frustrate congressional intent because "the clear focus of Congress was on private debtors, not the States." It is true that most of the Act's mechanisms for enhancing the federal government's debt-collection efforts—including the mandatory interest and penalty provisions of Section 3717—were directed against private debtors, but respondents' position draws no support from that fact. Congress clearly recognized that state and local governments owe large sums to the federal treasury (see S. Rep. No. 378, 97th Cong., 2d Sess. 2 (1982)), and there is no hint of any congressional intent to *diminish* the federal government's ability to collect debts from those entities or to *increase* the incentives for those entities to delay payment. Any interpretation of the Act that leads to those results—as respondents' assuredly does—is contrary to the language of the Act's preamble, which provides that Congress's purpose was "[t]o *increase* the efficiency

of Government-wide efforts to collect debts owed the United States and to provide *additional* procedures for the collection of debts owed the United States." 96 Stat. 1749 (emphasis added).

Respondents also assert (Br. 10-11) that imposition of interest on delinquent state debts under the Food Stamp Program would be "inequitable" because delays during the pendency of a State's administrative appeal may occur through no fault of the State. Even if respondents were correct in this regard, their conclusion—that the common-law remedy has been abrogated—would not follow, because the common law has ample flexibility to take account of and avoid true inequity. See *West Virginia* v. *United States*, 479 U.S. 305, 309, 311 n.3 (1987). In any event, respondents seriously misconceive the nature of the prejudgment-interest remedy. Prejudgment interest is not a "penalty" to be applied only where one party can be shown to be at fault for a particular delay; rather, an award of prejudgment interest is purely compensatory, and serves merely to maintain the status quo by preserving the real value of an existing debt so that neither party to the dispute benefits or suffers from a delay in payment. Imposition of prejudgment interest is in keeping with the "dictate[s] of natural justice, and the law of every civilized country," *Curtis* v. *Innerarity*, 47 U.S. (6 How.) 146, 154 (1848), and with "the historic judicial principle that one for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained." *Rodgers* v. *United States*, 332 U.S. 371, 373 (1947).

Indeed, it is the *failure* to impose prejudgment interest that would result in inequity here, because it would reward respondents for their unjustified delay in payment at the expense of the federal government. The Food Stamp Act and its implementing regulations impose liability on the States for excessive mail issuance losses in order to limit the federal government's costs; permitting the States to delay satisfaction of their obligations without payment of interest would upset the liability scheme mandated by Congress and the Secretary of Agriculture by allowing delinquent States to avoid reimbursing the federal fisc for the real value of their obligations. Hence, imposition of prejudgment interest on respondents' debts is clearly appropriate, because "fully repaying the Federal Government * * * will further the distribution of the burdens * * * that Congress intended." *West Virginia* v. *United States*, 479 U.S. at 310-311.

Finally, respondents assert (Br. 11) that the availability of administrative offsets against the States under some statutory schemes serves to eliminate the inconsistency between their preferred construction of the Debt Collection Act and Congress's express purpose in adopting that Act. Respondents' conclusion is a non sequitur. The fact that Congress has created specific administrative-offset schemes in certain contexts provides no support for respondents' conclusion that Congress intended to abrogate the common-law prejudgment-interest remedy in *all* contexts, and did so silently as part of a statute intended solely to *enhance* the federal government's ability to collect its debts.[6]

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[6] Similarly, the fact that Congress has mandated the imposition of prejudgment interest on debts owed by the States

2. Respondents halfheartedly assert (Resp. Br. 21-22) that an award of prejudgment interest in this case is inappropriate under the common law because, in their view, their obligation to reimburse the federal government for mail issuance losses is a non-interest-bearing "penalty" rather than a contractual debt. In making that assertion, however, respondents ignore the undisputed fact—discussed in detail in our opening brief (see U.S. Br. 3-4, 31-32)—that the federal regulation requiring respondents to assume liability for mail issuance losses was expressly incorporated as a term of the contract between respondents and the United States.

Respondents do not and cannot deny (1) that their participation in the federal Food Stamp Program is governed by the Federal/State Agreement, 7 C.F.R. 272.2(a)(2); (2) that pursuant to that Agreement they have contractually agreed to be bound by the Food Stamp Act and all Food Stamp Program regulations as well as "any changes in Federal law and regulations," 7 C.F.R. 272.2(b)(1); and (3) that their obligation to reimburse the federal government for the mail issuance losses involved in this case arises from a Food Stamp Program regulation, 7 C.F.R. 274.3 (1986). Thus, there is no basis for respondents' assertion that their underlying obliga-

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in certain contexts provides no support for respondents' conclusion that Congress intended the Debt Collection Act to abrogate the common-law prejudgment-interest remedy generally. Respondents invoke specific interest provisions of the Medicaid Act, 42 U.S.C. 1396b(d)(5), and the Social Security Act, 42 U.S.C. 418(j) (1982) (see Resp. Br. 13), but both of those provisions were enacted *prior* to the adoption of the Debt Collection Act (see Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, Tit. IX, § 961(a), 94 Stat. 2650, codified as amended at 42 U.S.C. 1396b(d)(5); Social Security Act Amendments of 1950, ch. 809, sec. 106, § 218(j), 64 Stat. 517, codified as amended at 42 U.S.C. 418(j) (1982), repealed, Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, Tit. IX, § 9002(c), 100 Stat. 1971), and thus can hardly be read to support the proposition that Congress intentionally abrogated a common-law remedy that unquestionably existed both before and after their adoption. Moreover, those provisions merely codified and made mandatory the collection of prejudgment interest at a specified rate in certain limited circumstances, thus strengthening the government's remedies beyond those provided at common law. Those provisions are certainly not evidence of any legislative intention that, in their absence, there would be *no* interest available.

Respondents also err in relying (Br. 13) on Pub. L. No. 100-435, § 602, 102 Stat. 1674 (1988), which amended 7 U.S.C. 2022 to provide for prejudgment interest on obligations arising under the Food Stamp Act's quality-control program. "[S]ubsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress." *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (citations omitted); see also *Consumer Product Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 118 n.13 (1980). That is particularly true in this case, where the 1988 Congress that adopted the amendment had considerable reason to believe that, whatever Congress's actual intentions with respect to preservation of the common law, the lower courts would not look favorably on attempts by the federal government to exercise its common-law prejudgment-interest remedies. See, *e.g.*, *Perales* v. *United States*, 751 F.2d 95 (2d Cir. 1984); *Pennsylvania Dep't of Public Welfare* v. *United States*, 781 F.2d 334, 341-342 (3d Cir. 1986); *Arkansas* v. *Block*, 825 F.2d 1254, 1258 (8th Cir. 1987). Moreover, Congress's adoption of amended Section 2022 did not, as respondents would have it (Br. 13), constitute a "redundant codification of common law"; instead, it replaced the discretionary common-law remedy with a *mandatory* provision requiring prejudgment interest at a specified rate in certain circumstances and not in others.

tion to the United States is not "a debt created by a contractual arrangement." Resp. Br. 21.

Respondents suggest (Br. 21) that their obligation to reimburse the federal government for mail issuance losses was imposed unilaterally and arbitrarily by the Secretary of Agriculture without negotiation and over their objection,[7] and that this somehow ne-

[7] Respondents' objections in this regard are considerably exaggerated. There was certainly nothing "arbitrary" about the tolerance level selected by the Secretary of Agriculture. That regulatory limit was adopted only after exhaustive and meticulous consideration of the matter in public rulemaking proceedings conducted in accordance with the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. 553. The tolerance level was based upon an examination of historical mail loss data which suggested that a mail loss limit of 0.5% would be a "realistically attainable goal." 47 Fed. Reg. 50,682 (1982). Challenges to the validity of the mail loss tolerance level have been unanimously rejected by the courts, see *Arkansas* v. *Block*, 825 F.2d 1254, 1256-1257 (8th Cir. 1987); *Gallegos* v. *Lyng*, 891 F.2d 788, 792 (10th Cir. 1989), and respondents expressly declined to challenge the tolerance level below. Pet. App. 16a. Having deliberately abandoned any contention that the mail loss tolerance level was set arbitrarily by the Secretary, respondents should not be permitted to resurrect that contention here.

Respondents also err in suggesting (Br. 21) that the imposition of liability on the States for mail issuance losses is not subject to judicial review. Although the Secretary's decision whether to waive a State's liability is not itself judicially reviewable because it is committed to agency discretion by law (see 5 U.S.C. 701(a)(2); Pet. App. 5a-7a), respondents point to nothing that would preclude judicial review of a misapplication of the regulatory loss tolerance level. The analogy to a traditional commercial contract is precise: courts do not typically review the propriety of one party's discretionary decision to waive the other party's contractual obligations; rather, judicial review is available only to enforce the contract according to its terms.

gates the contractual nature of that obligation. In fact, however, virtually all of the terms of the Food Stamp Program, and for that matter most other federal-state cooperative grant programs as well, are "unilaterally" imposed by Congress or the responsible federal agency in the form of statutes and regulations, and the States must either agree to abide by those terms or decline to participate in the program. See *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1, 11 (1981). The federal government's exercise of its prerogative to specify the terms on which its money will be spent does not eliminate the contractual nature of the obligations imposed on States that choose to participate in federal grant programs; rather, it *defines* the terms of the contract between the federal government and each participating State. See, *e.g.*, *id.* at 17.

Respondents also contend (Br. 21) that their liability for mail issuance losses is "punitive" in nature. As we explain in our opening brief (U.S. Br. 3-4, 33-34), however, there is nothing "punitive" about requiring a State to compensate the federal government for a fraction of the financial losses caused by the State's decision to distribute food stamp coupons through the mails; the federal government is simply asking the States to shoulder responsibility for a portion of the costs of operating the Food Stamp Program, costs that would otherwise be borne exclusively by the United States. Respondents do not take issue with the fact that the federal government incurs direct financial losses when food stamp coupons are stolen in the mails and then redeemed by persons other than the intended recipients, and thus it is im-

possible to discern any basis for respondents' assertion that their liability for excessive mail issuance losses is "punitive" rather than compensatory in nature.

3. a. Respondents renew their contention (Resp. Br. 22-24) that imposition of prejudgment interest in this case is barred by *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981). According to respondents, they did not "voluntarily and knowingly accept[]" (Resp. Br. 23) the obligation to pay interest, because the Food Stamp Act itself does not itself include such a requirement.

As we point out in our opening brief (U.S. Br. 29-30), at all times relevant to this case, federal law expressly and unambiguously provided that federal agencies retained the right to seek prejudgment interest under the common law on debts owed by state and local governments. See 4 C.F.R. 102.13(i); 49 Fed. Reg. 8894, 8901 (1984). Respondents do not and cannot dispute that fact. Moreover, the notices mailed to respondents informing them of the amount of their liability for mail issuance losses expressly stated that, pursuant to federal law, prejudgment interest would begin to accrue if respondents failed to pay their obligations within 30 days. J.A. 7, 10. Thus, respondents were clearly on notice, well before they incurred the debts and interest obligations at issue in this case, that they could be liable for mail issuance losses and prejudgment interest thereon if they chose to continue their policy of mail issuances and if they failed to pay their obligations in a timely manner. Respondents' attempt to deny the voluntary and knowing nature of their obligations is entirely without foundation.

This Court's decision in *West Virginia* v. *United States*, *supra*, further demonstrates the insubstantial-

ity of respondents' contentions in this regard. In that case, as here, the State argued that imposition of prejudgment interest under the common law would violate *Pennhurst*, because the statute giving rise to the underlying debt was silent as to the availability of prejudgment interest. See 85-937 Pet. Br. at 21-23.[8] The United States argued in reply that the State "had reason to anticipate its liability for interest: interest is an expected part of a debt liability, rather than an unanticipated term attached to receipt of funds." 85-937 U.S. Br. at 20 n.8. The Court's opinion in *West Virginia* did not discuss the *Pennhurst* issue, but in upholding the imposition of prejudgment interest on the State under the common law the Court implicitly rejected the State's reliance on *Pennhurst*. See, *e.g.*, *Clemons* v. *Mississippi*, 494 U.S. 738, 747-748 n.3 (1990). The same result is equally appropriate here.[9]

b. Respondents also assert (Br. 24) that imposition of prejudgment interest is inappropriate under

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[8] Indeed, the petitioner in *West Virginia* relied in part on two court of appeals cases applying *Pennhurst* to bar an award of prejudgment interest in precisely the circumstances of this case. See 85-937 Pet. Br. at 23 (citing *Pennsylvania Dep't of Public Welfare* v. *United States*, 781 F.2d 334, 342 nn. 12 & 13 (3d Cir. 1986); *Perales* v. *United States*, 751 F.2d 95 (2d Cir.), aff'g 598 F. Supp. 19, 24-26 (S.D.N.Y. 1984)).

[9] Respondents assert (Br. 23) that *West Virginia* is inapposite, because the contract at issue in that case was not covered by the Debt Collection Act. That fact is beside the point for purposes of respondents' *Pennhurst* defense, however; both before and after enactment of the Debt Collection Act, a State could contend that imposition of prejudgment interest under the common law would violate *Pennhurst* in the absence of an express provision for that remedy, but this Court in *West Virginia* necessarily, albeit implicitly, rejected that contention.

Pennhurst because respondents' "violation" of the Food Stamp Act was "unintentional," in that the mail issuance losses resulted from the actions of third parties over whom respondents had no control.[10] That assertion is incorrect.

In the first place, respondents did not "violat[e]" federal law by incurring mail issuance losses in excess of the loss tolerance limits. To the contrary, they were legally and contractually *entitled* to issue food stamp coupons by mail, and mail issuance losses were an inevitable and anticipated result of respondents' decision to utilize that issuance system. Thus, this case involves merely the allocation of foreseeable financial losses pursuant to the terms of a federal/state contract, not the imposition of liability for a violation of federal law. Accordingly, the rule cited by respondents has no application here.

In any event, respondents *did* intentionally incur the liability at issue in this case, *i.e.*, the obligation to pay prejudgment interest on their underlying debt for

[10] Respondents assert (Br. 24) that the mail issuance losses involved in this case were solely the result of theft by employees of the United States Postal Service, and imply (Br. 3) that respondents' liability for those losses should therefore have been excused. In fact, however, the record in this case does not reveal the proportion of total mail issuance losses that was due to theft by Postal Service employees, and it is at least open to question whether those thefts exceeded the approximately $700,000 of total mail issuance losses that the federal government did *not* pass on to respondents. See U.S. Br. 4-5 n.3. In any event, there is no basis for respondents' implication that they should not have been held liable for the mail issuance losses suffered as a result of theft by Postal Service employees. Respondents' claim to that effect was correctly rejected below (Pet. App. 25a-26a), and they did not file a cross-petition for certiorari seeking to challenge that ruling.

mail issuance losses.[11] Respondents were on both actual and constructive notice that prejudgment interest would be sought if they failed to pay their obligations within 30 days. J.A. 7, 8, 10, 11; 4 C.F.R. 102.13(i). They nonetheless chose to pursue an administrative appeal and judicial review, thereby knowingly incurring liability for the prejudgment interest necessary to compensate the federal government for the delay in payment engendered by respondents' appeals. Accordingly, respondents' reliance on the *Pennhurst* doctrine is misplaced, because this is not a case in which "the receiving entity of federal funds lacks notice that it will be liable for a monetary award." Resp. Br. 24 (quoting *Franklin* v. *Gwinnett County Pub. Schools*, 112 S. Ct. 1028, 1037 (1992)).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

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[11] For that matter, respondents also intentionally incurred their liability for mail issuance losses. The terms of the contract between respondents and the United States unambiguously provided that respondents would be liable for all mail issuance losses in excess of the loss tolerance level if they chose to issue food stamp coupons by mail. Respondents nonetheless chose to utilize the mail issuance system, and thus they must be deemed to have intentionally incurred the resulting losses, which were clearly foreseeable.

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